DOCKET

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Status: GRANTED

Title: Northbrook National Insurance Company, Petitioner
v.
Larry W. Brewer, et al.

Docketed:
December 12, 1988

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Jung,Peter Michael

Counsel for respondent: Fults,Timothy M.

Entry	Date	Note	Proceedings and Orders
1	Dec 12 1988	G	Petition for writ of certiorari filed.
2	Jan 18 1989		DISTRIBUTED. February 17, 1989
3	Jan 19 1989	X	Brief of respondent Larry Brewer in opposition filed.
4	Jan 30 1989	X	Reply brief of petitioner Northbrook National Insurance Co. filed.
6	Feb 21 1989		REDISTRIBUTED. February 24, 1989
7	Feb 27 1989		Petition GRANTED.
			**********
8	Mar 20 1989		Record filed.
		*	Certified copy of original record and proceedings, 2 volumes, received.
9	Apr 13 1989		Brief amicus curiae of American Insurance Association filed.
10	Apr 15 1989		Joint appendix filed.
11	Apr 15 1989		Brief of petitioner Northbrook National filed.
13	May 4 1989		Order extending time to file brief of respondent on the merits until June 17, 1989.
14	Jun 16 1989		Brief of respondent Larry Brewer filed.
15	Jul 12 1989		CIRCULATED.
16	Jul 13 1989	X	Reply brief of petitioner Northbrook National Insurance filed.
17	Jul 20 1989		SET FOR ARGUMENT WEDNESDAY, OCTOBER 4, 1989. (4TH CASE)
18	Oct 4 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-995

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1988

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER, *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The "direct action proviso" to 28 U.S.C. § 1332(c) applies to direct actions against an insurer of a policy or contract of liability insurance. Where these conditions are satisfied, the direct action proviso deems the insurer to share the citizenship of its insured for diversity jurisdiction purposes.

The questions presented in this petition are:

(1) Despite the direct action proviso's clear and unambiguous reference to suits "against" insurers, does the proviso apply to a workers' compensation suit filed *by* an insurer *against* an allegedly injured employee to obtain an adjudication of non-liability?

(2) Does the direct action proviso, which was enacted in response to certain state tort statutes permitting direct actions against insurance carriers in lieu of actions against the parties insured by them, apply to a workers' compensation suit which could not have been filed directly against the employer-insured?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner Northbrook National Insurance Company and the respondent Larry W. Brewer.

Petitioner Northbrook National Insurance Company is a member of the Allstate Group of insurance companies. Its parent corporation is Allstate Insurance Company, whose parent corporation is Sears, Roebuck & Company. Its affiliates are:

Allstate Automobile and Fire Insurance Company, Ltd.
Allstate County Mutual Insurance Company
Allstate Indemnity Company
Allstate Insurance Company of Canada
Allstate Life Insurance Company
Allstate Life Insurance Company of Canada
Allstate Life Insurance Company of New York
Allstate Property and Casualty Insurance Company
Allstate Reinsurance Company, Ltd.
Lincoln Benefit Life Company
Northbrook Indemnity Company
Northbrook Life Insurance Company
Northbrook Property and Casualty Insurance Company
PMI Insurance Company
PMI Mortgage Insurance Company
Seibu Allstate Life Insurance Company, Ltd.
Surety Life Insurance Company

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No. _____

In The

Supreme Court of the United States

October Term, 1988

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER, *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Northbrook National Insurance Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on September 13, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 854 F.2d 742. It is reprinted in the appendix to this petition at pp. A-1-9.

The memorandum order of the United States District Court for the Eastern District of Texas has not been reported. It is reprinted in the appendix to this petition at pp. A-11-13.

JURISDICTION

The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. The opinion and judgment of the Court of Appeals were entered on September 13, 1988. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1332 states in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between –

(1) citizens of different States; . . . .

* * *

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of

the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

STATEMENT OF THE CASE

The jurisdiction of the district court was based on diversity of citizenship under 28 U.S.C. § 1332, the plaintiff Northbrook National Insurance Company ("Northbrook") being a citizen of Illinois and the defendant Larry W. Brewer ("Brewer") being a citizen of Texas. The applicability to this case of the "proviso" to 28 U.S.C. § 1332(c) is the gravamen of this petition.

Northbrook brought this suit against Brewer to appeal a final award of the Texas Industrial Accident Board. Northbrook is a corporation organized under the laws of the State of Illinois, with its principal place of business in that state. (R. 1; p. A-15, *infra*). Brewer is a citizen of the State of Texas. (*Id.*) Northbrook provided workers' compensation insurance for Brewer's employer Whitmore Line Clearance, Inc., which is a Texas corporation. (R. 2, 8, 45; pp. A-15-16, *infra*).

The suit was filed in federal district court by Northbrook. Brewer moved to "remand" to a state court, or alternatively to dismiss, on the ground of lack of subject matter jurisdiction. (R. 39-40). The district court denied "remand" but dismissed the case for lack of subject matter jurisdiction. (R. 47-50; pp. A-11-14, *infra*). The Court of Appeals affirmed on the basis of its precedents in *Hernandez v. Travelers Insurance Co.*, 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974), and *Campbell v. Insurance*

Co. of North America, 552 F.2d 604 (5th Cir. 1977). Both the district court and the Fifth Circuit panel reluctantly followed those decisions, questioning their soundness and noting the conflict between *Campbell* and *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979).

REASONS FOR GRANTING THE WRIT

This case presents a square and acknowledged conflict between circuits, on a question which affects the filing of suits by workers' compensation insurance carriers throughout the United States. In *Hernandez v. Travelers Insurance Co.*, 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974), the Fifth Circuit held that an action by an allegedly injured worker against a workers' compensation insurance carrier for recovery of workers' compensation benefits falls within the direct action proviso to 28 U.S.C. § 1332(c). In *Campbell v. Insurance Co. of North America*, 552 F.2d 604 (5th Cir. 1977), the Fifth Circuit extended *Hernandez* to actions by the compensation carrier against the allegedly injured worker. The Sixth Circuit has held, contrary to *Campbell*, that an action by an insurance carrier does not come within the direct action proviso. *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979).[1]

[1] Both circuits have noted the express conflict between *Greene* and *Campbell*. *Northbrook National Insurance Co. v. Brewer*, 854 F.2d 742, 743 (5th Cir. 1988); *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123, 127 (6th Cir. 1979); *Continental Casualty Co. v. Canadian Universal Life Insurance Co.*, 605 F.2d 1340, 1343 n.2 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

The *Campbell-Greene* conflict affects the ability of workers' compensation insurers[2] nationwide to file suits in federal court when (as is often the case) the employer they insure is of the same citizenship as the allegedly injured employee. This conflict cannot safely be left to further case development. Typically, workers' compensation claims are heard by an administrative panel, with a right of appeal to the courts by an aggrieved party. Such appeals are generally subject to short and strict filing deadlines,[3] and hence usually cannot be refiled in state court following a jurisdictional dismissal in federal court.[4] Hence compensation carriers outside the Fifth and Sixth Circuits, who might otherwise be inclined to test their circuit's position on this issue, will be inhibited from doing so by the risk of forfeiting review on the merits should their jurisdictional test prove unsuccessful.

The record in this case presents the *Campbell-Greene* issue squarely and cleanly; the issue was decided by both courts below as one of pure law on the basis of undisputed facts. It also presents a related issue, that of the

[2] Campbell has been limited by the Fifth Circuit to the workers' compensation context. *Evanston Insurance Co. v. Jimco, Inc.*, 844 F.2d 1185, 1189 (5th Cir. 1988); *Dairyland Insurance Co. v. Makover*, 654 F.2d 1120, 1124 (5th Cir. Unit B Sept. 1981).

[3] *E.g.*, Tex. Rev. Civ. Stat. art. 8307, § 5 (notice of intent to appeal within twenty days of Board award; suit within twenty days of notice of intent to appeal).

[4] *See, e.g., Castillo v. Allied Insurance Co.*, 537 S.W.2d 486, 487 (Tex. Civ. App. – Amarillo 1976, writ ref'd n.r.e.) (Texas tolling statute for jurisdictional errors does not apply to workers' compensation suits).

correctness of *Hernandez'* holding that the "direct action" proviso applies to workers' compensation suits even in those states where workers' compensation actions may not be filed directly against the employer-insured. *Hernandez, Campbell,* and *Greene* continue to foment jurisdictional uncertainty in this area of the law, which is only likely to be resolved through this Court's intervention.

I. THE DIRECT ACTION PROVISO HAD A SPECIFIC AND LIMITED REMEDIAL PURPOSE UNRELATED TO SUITS BY INSURERS, AND UNRELATED TO WORKERS' COMPENSATION SUITS IN GENERAL.

The direct action proviso was enacted in 1964. Its legislative history demonstrates that its purpose was to alleviate the enormous caseloads faced by federal district courts in the State of Louisiana.[5] Louisiana and Wisconsin had enacted "direct action" statutes, under which an injured party could pursue a tort action directly against

[5] S. Rep. No. 1308, 88th Cong., 2d Sess. (1964) (hereinafter "Senate Report"), *reprinted in* 1964 U.S. Code Cong. & Ad. News (hereinafter "USCCAN") 2778; H.R. Rep. No. 1229, 88th Cong., 2d Sess. (1964) (hereinafter "House Report"); 110 Cong. Rec. 9313-17 (daily ed. Apr. 28, 1964). This purpose is confirmed by the case authorities and commentators. *E.g., Ford Motor Co. v. Insurance Co. of North America,* 669 F.2d 421, 424 (6th Cir. 1982); *Torres v. Hartford Insurance Co.,* 588 F.2d 848, 849-50 (1st Cir. 1978); Note, *Federal Diversity Jurisdiction in Direct Actions – A Dispute Over the Application of Section 1332(c),* 29 U. Kan. L. Rev. 143, 146-47 (1980); 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3629, at 671 (1984).

the tortfeasor's liability insurance carrier, without joining the tortfeasor or first obtaining a judgment against him. This Court had held in *Lumbermen's Mutual Casualty Co. v. Elbert,* 348 U.S. 48 (1954), that such "direct actions" could be filed in federal court if the requisite diversity of citizenship were present between the injured party and the insurance carrier. As a result of the *Elbert* holding, in combination with an unusually liberal Louisiana state court rule regarding appellate reexamination of jury findings,[6] the dockets of the federal courts in Louisiana were swamped with such cases.[7] The Congressional response to this situation was to deem the insurance company defendant in a direct action to share the citizenship of its insured, thereby destroying diversity where the injured party and the insured were both local residents.

The legislative history of the direct action proviso reflects a Congressional belief that federal court jurisdiction over direct actions by injured parties against insurance carriers was an accidental by-product of the Louisiana and Wisconsin "direct action" statutes.[8] Its focus throughout was upon the conduct of injured party plaintiffs who would, but for a "direct action" statute, be suing a co-citizen tortfeasor. Congress understandably

[6] Senate Report at 4, 1964 USCCAN 2781; House Report at 4; 110 Cong. Rec. 9315 (daily ed. Apr. 28, 1964) (remarks of Rep. Celler).

[7] Senate Report at 2-6, 1964 USCCAN 2779-83; House Report at 3-7.

[8] Senate Report at 4, 1964 USCCAN 2781; House Report at 4.

concluded that such suits "do not come within the spirit or the intent of the basic purpose of the diversity jurisdiction,"[9] namely to protect out-of-state parties against local bias. Nothing in the legislative history suggests any Congressional concern whatsoever with suits by insurance carriers in federal courts, which were not generated by the enactment of "direct action" statutes, which fall within the intent of diversity jurisdiction (*see* Section II, *infra*), and which do not appear to have contributed to any of the excessive caseloads which prompted the direct action proviso.

Likewise, Congress clearly did not have workers' compensation suits in mind when it enacted the direct action proviso. The Congressional committees referred to the existence of "two States, namely Louisiana and Wisconsin, which have 'direct action' statutes."[10] Obviously, this list would have been much longer if workers' compensation statutes, which had been prevalent throughout the United States for many decades, had been considered to be "direct action" statutes. In 1958, Congress had specifically addressed the problem of a proliferation of workers' compensation suits in the federal courts, eliminating removal jurisdiction of such suits.[11] Three years later, this Court had held that original federal diversity jurisdiction over workers' compensation actions

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[9] Senate Report at 9, 1964 USCCAN 2784; House Report at 9.

[10] Senate Report at 2, 1964 USCCAN 2779; House Report at 2.

[11] 28 U.S.C. § 1445(c), as added by Pub. L. No. 85-554, § 5, 72 Stat. 415 (1958).

remained unaffected by the 1958 amendment. *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961). Yet the legislative history of the 1964 direct action proviso may be searched in vain for any indication that Congress perceived the filing of workers' compensation suits in federal courts as a persistent evil requiring further correction.

II. THIS ACTION IS NOT "AGAINST" THE INSURER; *GREENE* IS RIGHT AND *CAMPBELL* IS WRONG.

This Court has favored literalism in the interpretation of the diversity jurisdiction statutes. In *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961), the Court, in determining that the district courts retained original diversity jurisdiction of workers' compensation suits notwithstanding the statutory elimination of removal jurisdiction over such suits, held that it "must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth."

In *Campbell v. Insurance Co. of North America*, 552 F.2d 604, 605 (5th Cir. 1977), the Fifth Circuit eschewed the literalism embraced by this Court in *Horton*, holding that a workers' compensation action (such as the present) brought *by* an insurer was in fact an action *against* the insurer within the meaning of the direct action proviso. It enigmatically held that the distinction between actions against an insurance carrier (which are expressly included in the proviso) and actions by the carrier (which are not mentioned in the proviso) "is valid, but too thin." 552 F.2d at 605. The *Campbell* court erred, by giving

inadequate consideration to the statute's legislative history, by incorrectly analyzing the policy implications of its holding, and, perhaps most importantly, by doing extreme violence to the clear language of the statute.

In *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979), the Sixth Circuit expressly rejected *Campbell*. It began by noting that "nowhere in the extensive history of the amendment is reference made to an action brought by [an] insurer. Rather, the history of the amendment indicates that Congress was concerned exclusively with so-called 'direct actions' by injured parties." 606 F.2d at 127. This analysis is correct; as noted in Section I, *supra*, the Congressional focus in enacting the direct action proviso was on the fortuitous effect of "direct action" statutes in prompting federal filings by injured parties.

The Sixth Circuit next took sharp issue with the *Campbell* court's conclusion that it would somehow be unfair to afford a federal forum to an out-of-state insurer while denying such a forum to a resident employee:

> If, pursuant to § 1332(c), a liability insurer is denied access to the federal courts, the insurer is thereby forced to commence its action in a foreign jurisdiction, namely the local jurisdiction of the injured party. In this forum, the out-of-state insurer may, at least in theory, be subject to a local prejudice in favor of the injured resident. Because of this possibility of prejudice, direct actions brought by liability insurers, unlike direct actions brought by injured parties, lie squarely within "the spirit and the intent . . . of the diversity jurisdiction of the Federal judicial system."

606 F.2d at 127, *quoting* 1 J. Moore, *Moore's Federal Practice* ¶ 0.71.[12]

Finally, the Sixth Circuit paid due respect to the statutory language, holding that "a court cannot apply § 1332(c) to actions brought *by* liability insurers when explicit statutory language directs that the section applies to ' . . . direct action[s] *against* [such] insurer[s] . . . .' " 606 F.2d at 127-28 (emphasis in original).[13] In so holding,

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[12] The *Campbell* court relied on its view of "the overall process seen as a whole" in a workers' compensation case as "a process initiated by the injured workman against the insurer . . . ." 552 F.2d at 605. For diversity jurisdiction purposes, however, the critical analysis is not of "the overall process seen as a whole," but of the posture of the parties and the case at the point where a judicial forum is selected. Forum selection is reserved to the party who initiates the judicial portion of the compensation claim process (*i.e.*, the nominal plaintiff), whether that party is the carrier or the employee. *See, e.g.*, Tex. Rev. Civ. Stat. art. 8307a. As noted above, the direct action proviso was intended to circumscribe the initiating party's forum selection latitude only in cases "against" an out-of-state insurer, in order to prevent local plaintiffs from gratuitously choosing the federal courts in preference to their own local state fora. The out-of-state insurer's choice of a federal forum, on the other hand, is far from gratuitous. In evaluating whom the action is "against," therefore, the controlling factor is the alignment of the parties when the case is filed in court, not, as the *Campbell* court focused upon, when it is filed before the administrative board, when it is tried to the jury, or when the burden of proof is allocated.

[13] *Accord*, *Atlantic Mutual Insurance Co. v. Mitchell*, 333 F. Supp. 70, 71 (N.D. Tex. 1971) (overruled in *Campbell*); Note, *supra* n.5, 29 U. Kan. L. Rev. at 150 ("The Fifth Circuit's judicial 'revision' of the statute disregarded the actual language of section 1332(c)").

the Sixth Circuit, in contradistinction to the Fifth Circuit in *Campbell*, heeded the policy of strict construction established by this Court in *Horton*. A paraphrase of this Court's language from that case reveals the remarkable similarity of this Court's rationale to that of the Sixth Circuit in *Greene*:

> Congress used language specifically barring [direct actions against insurers] and at the same time left unchanged the old language which just as specifically permits civil suits [by insurers] to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount. In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth. Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as [against the insurer], and it could easily do so still. [This Court should] therefore hold that under the present law the District Court has jurisdiction to try this civil case between citizens of different States if the matter in controversy is in excess of $10,000.

Cf. Horton v. Liberty Mutual Insurance Co., 367 U.S. at 352.

III. THIS IS NOT A "DIRECT ACTION" AGAINST A "LIABILITY" INSURER; *HERNANDEZ* IS WRONG.

"[T]he words 'direct action' were used to refer to statutes such as those in Louisiana and Wisconsin which allow a party injured by the negligence of an insured to pursue his right of action against the insurer alone." *White v. United States Fidelity & Guaranty Co.*, 356 F.2d 746, 747-48 (1st Cir. 1966). "[U]nless the cause of action against the insurance company is of such a nature that

the liability sought to be imposed could be imposed against the insured, the action is not a direct action." *Fortson v. St. Paul Fire & Marine Insurance Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985). "Direct actions" are "those cases in which a party suffering injuries or damage for which another is legally responsible is entitled to bring suit against the other's liability insurer without joining the insured or first obtaining judgment against him." *Beckham v. Safeco Insurance Co.*, 691 F.2d 898, 901-02 (9th Cir. 1982).

One hallmark of a "direct action" is that "the act for which liability is sought to be imposed against the insurance company is the same act for which liability could be imposed against the insured." *Bowers v. Continental Insurance Co.*, 753 F.2d 1574, 1576-77 (11th Cir.), *cert. denied*, 473 U.S. 906 (1985). That is not the case with workers' compensation actions, inasmuch as compensation benefits are available irrespective of whether the employer would otherwise have been liable for the employee's injuries.[14]

The Fifth Circuit held in *Hernandez* that a Texas workers' compensation suit is a "direct action," reasoning

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[14] *See, e.g., Parker v. Employers Mutual Liability Insurance Co.*, 440 S.W.2d 43, 45 (Tex. 1969) (benefits available where employer not negligent or otherwise at fault); Tex. Rev. Civ. Stat. art. 8309, § 1 (benefits available for injuries from certain Acts of God); *Nasser v. Security Insurance Co.*, 724 S.W.2d 17, 19 (Tex. 1987) (benefits available for injuries from deliberate assault by third person).

that it is a suit in which "a party claiming to have suffered injuries or damage *for which another is legally responsible* is entitled to sue the other's liability insur[e]r without joining the insured and without having first obtained a judgment against the insured." 489 F.2d at 724 (emphasis supplied). This broad reasoning oversimplifies the issue and thereby misapplies the statute in many situations. In some states, an employer is legally responsible for the payment of workers' compensation benefits, and a suit against a compensation insurer may indeed be a "direct action." In other states, however, such as Texas, an employer is not legally responsible for compensation benefits,[15] and is not even a proper party to a workers' compensation suit.[16] In those states, the insurer's liability is primary and not derivative of a similar liability on the

[15] Tex. Rev. Civ. Stat. art. 8306, § 3 ("such employees and their representatives and beneficiaries shall look for compensation solely to the association . . . "); *City of Austin v. Powell*, 321 S.W.2d 924, 930 (Tex. Civ. App. – Austin 1959, writ ref'd n.r.e.). *See also, e.g., Glass v. Stahl Specialty Co.*, 97 Wash. 2d 880, 652 P.2d 948, 952 (1982); *Liberty Mutual Insurance Co. v. American Incinerator Co.*, 51 F. Supp. 739, 742 (S.D.N.Y. 1931).

[16] *E.g.*, Tex. Rev. Civ. Stat. art. 8307, § 5; *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 702 (5th Cir. 1963) (applying Texas law); *Transport Insurance Co. v. Jaeger*, 534 S.W.2d 389, 391 (Tex. Civ. App. – Houston [1st Dist.] 1976, writ ref'd n.r.e.).

part of the insured, and hence a workers' compensation action is not a direct action.[17]

The *Hernandez* court purported to rely on a literal reading of the language of the direct action proviso, and to disclaim any attempt or power to deviate from that literal language in pursuit of a more meaningful result. 489 F.2d at 723-24. In the name of literalism, however, the court ironically departed from the text of the statute by effectively equating the phrase "direct action" with the truncated phrase "action."[18] The word "direct," which cannot be regarded as mere surplusage,[19] refers to an action brought directly against the insurance carrier which might instead have been brought indirectly against the insurance carrier by being brought directly against the insured. In Texas and other states with a similar statutory scheme, workers' compensation actions do not qualify for that adjective.

[17] It does not appear that the *Hernandez* court was aware of the far-reaching ramifications of its ruling on this peculiarity of the Texas workmen's compensation system or the inconsistency of that ruling with the *Vines [v. United States Fidelity & Guaranty Co.*, 267 F. Supp. 436 (E.D. Tenn. 1967)] construction and other settled doctrines based on that consideration." Barker, *Insurance Litigation, Diversity Jurisdiction, and the "Direct Action" Proviso*, 35 Fed'n Ins. Couns. Q. 225, 245 (1985).

[18] Barker, *supra* n.17, 35 Fed'n Ins. Couns. Q. at 245.

[19] *Lank v. Federal Insurance Co.*, 309 F. Supp. 349, 351 (D. Del. 1970); *Carvin v. Standard Accident Insurance Co.*, 253 F. Supp. 232, 233 (E.D. Tenn. 1966).

Much of what has been said above with respect to "direct actions" also applies to the third statutory requirement, that the policy in question be one of "liability insurance." Such insurance involves "an indemnity agreement which protects the insured against his liability to others." *Twin City Fire Insurance Co. v. Wilkerson*, 247 F. Supp. 766, 767 (E.D. Tenn. 1965), *quoted in Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d at 126. Where the employer is not liable for workers' compensation benefits, compensation insurance is not liability insurance, because it is not an "indemnity agreement" at all.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case. The judgment of the Court of Appeals should be reversed and judgment should be rendered by this Court remanding the case to the district court for proceedings on the merits of the complaint.

Respectfully submitted,

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APPENDIX

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NORTHBROOK NATIONAL INSURANCE COMPANY,
Plaintiff-Appellant,

v.

Larry W. BREWER,
Defendant-Appellee.

No. 88-2238.

United States Court of Appeals,
Fifth Circuit.

Sept. 13, 1988.

—

Appeal from the United States District Court for the Eastern District of Texas.

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Larry Brewer is a Texas citizen. Alleging an injury sustained in the course of his employment, Brewer filed a workers' compensation claim with the Texas Industrial Accident Board. Brewer works for Whitmire Line Clearance, Inc., a Texas corporation. Whitmire's workers' compensation insurer, Northbrook National Insurance Company is incorporated and maintains its principal place of business in Illinois. On May 14, 1987, the Board rendered a final award on Brewer's claim.

Northbrook filed this action against Brewer in federal district court on May 27, 1987, appealing the Board's compensation award. Brewer moved to remand the case to state court on the ground that the federal court lacked

diversity jurisdiction due to the following proviso of 28 U.S.C. § 1332(c) (emphasis supplied):

> *[I]n any direct action against the insurer of a policy or contract of liability insurance,* whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.[1]

Noting that remand would be an inappropriate remedy, the district court dismissed the action for lack of subject matter jurisdiction, reluctantly relying on *Hernandez v. Travelers Insurance Co.*, 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844, 95 S.Ct. 78, 42 L.Ed.2d 73 (1974) and *Campbell v. Insurance Company of North America*, 552 F.2d 604 (5th Cir.1977) (per curiam). The district court stated its opinion that "these decisions do not represent an appropriate application of section 1332(c)," citing *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir.1979), but applied them nevertheless as binding precedent.

---

1. In cases not subject to this proviso, a corporation will be deemed for purposes of diversity jurisdiction and removal of a citizen of the states where it is incorporated and has its principal place of business. 28 U.S.C. § 1332(c). The proviso makes it possible for a corporation which falls within its terms to be deemed a citizen of three states rather than just two.

Legislative Purpose Behind the § 1332(c) Proviso

Section 1332(c) was amended in 1964, the quoted proviso being added in response to direct action statutes adopted in Louisiana and Wisconsin. S.Rep. No. 1308, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin.News 2778, 2779. Normally, a state law tort claim between residents of the same state would fall within the exclusive jurisdiction of the state courts. A direct action statute allows the injured party to bring suit directly against the insurer without joining the local tort-feasor, thus, when it is an out-of-state insurance company creating diversity jurisdiction where none existed before. As a result, the federal courts in the eastern district of Louisiana ended up with by far the heaviest caseload per judge of any district in the United States as new cases flooded in. *Id.* at 2779-81. The purpose of Congress' amendment to § 1332(c) was "to eliminate under the diversity jurisdiction of the U.S. district courts, suits on certain tort claims in which both parties are local residents, but which, under a State 'direct action' statute, may be brought directly against a foreign insurance carrier without joining the local tort-feasor as a defendant." *Id.* at 2778-79.

Fifth Circuit Application of § 1332(c) to Workers' Compensation Cases

In *Hernandez*, this court applied the § 1332(c) proviso to a workers' compensation claim filed by a Texas citizen against his employer's out-of-state insurance carrier, requiring the action to be dismissed for lack of subject matter jurisdiction. 489 F.2d at 722. We held that a suit filed against an insurer under a workers' compensation

statute is a "direct action" within the meaning of § 1332(c), *id.* at 723, despite the unique Texas statute which does not allow the employee to sue his employer directly, but relegates him to an action against the insurer. *Id.* at 724. We further held that workers' compensation insurance is a " 'policy or contract of [liability] insurance' within the meaning of § 1332(c)" *Id.* at 723.

In *Campbell*, the shoe was on the other foot. 552 F.2d at 605. An insurance company sought to appeal a workers' compensation award by the Texas Industrial Accident Board by filing an action in federal court. *Id.* at 604. *Hernandez* controlled entirely except for the circumstances that here the insurer brought the action rather than the claimant. *Id.* at 605. We recognized this distinction as "valid, but too thin" to merit a different result from *Hernandez*. *Id.* First, we suggested that the same policy considerations apply regardless of whether the claimant or the insurer brings the action. *Id.* Second, we recognized that the overall proceeding was in the nature of a claim by the injured workman against the insurer,[2]

---

2. The Texas statute governing workers' compensation appeals provides:

> If the final order of the [Industrial Accident] Board is against the Association, the Association and not the employer shall bring suit to set aside said final ruling and decision of the Board, if it so desires, and *the court shall in either event determine the issues* in such cause, instead of the Board, *upon trial de novo, and the burden of proof shall be upon the party claiming compensation.*

Tex.Civ.Stat.Ann. art. 8307, § 5 (Vernon Supp.1988) (emphasis added).

and noted that the district court had formally realigned the parties below. *Id.* Finally, we argued that to construe the statute as the insurer asked would provide a federal forum for a dissatified insurer, but not for the claimant. This result we took as a evidence that the statute should be interpreted otherwise. *Id.*

Sixth Circuit Reaction: The Aetna *Case*

The Sixth Circuit in *Aetna* squarely rejected our holding in *Campbell*. 606 F.2d at 127. *Aetna* involved a declaratory judgment action brought by an insurer seeking to settle any workers' compensation claims arising out of an employee's accident. *Id.* at 125. The Sixth Circuit agreed with us that a workers' compensation suit is a "direct action" under § 1332(c) and that workers' compensation insurance falls within the meaning of "liability insurance." *Id.* at 125-26. Thus, the *Aetna* court had no difficulty with our decision in *Hernandez*. *See id.* at 127. However, they refused to follow *Campbell* in applying § 1332(c) to actions brought *by* rather than *against* an insurance company. *Id.* The Sixth Circuit argued first that Congress in the legislative history of § 1332(c) was concerned only with suits brought by injured parties and never mentioned suits brought by insurance companies. *Id.* Second, they believed that distinguishing between foreign insurers and local claimants falls within the "spirit" of diversity jurisdiction by providing a federal forum to an out-of-state insurer who "may, at least in theory, be subject to a local prejudice in favor of the injured resident." *Id.* Finally, in their opinion the *Campbell* decision violated the explicit language of § 1332(c), which applies only to suits *against* an insurance company. *Id.* The Sixth Circuit argued:

> No court is allowed to supplement a clear statutory provision such as § 1332(c), even which such supplement would produce beneficial results. To do so would exceed the court's power of statutory interpretation, and would encroach upon the congressional power to legislate.

Id. at 127-28.

Appellant's Contentions

Appellant does not deny that the district court properly interpreted *Hernandez* and *Campbell* in dismissing its claim. Indeed, this case appears to be identical to *Campbell* in all material respects. Instead, appellant brings this action as a "test case," asking us to overrule either *Campbell* alone or both *Campbell* and *Hernandez*. Appellant levels three attacks upon our reasoning in those cases, any one of which, if accepted, would lead to the conclusion that the § 1332(c) proviso does not apply to bar its federal court action against Brewer.

First, appellant contends that an action under Texas' workers' compensation laws is not a "direct action" within the meaning of § 1332(c). Appellant argues that "direct action" is a term of art, referring to a suit brought directly against the insurer when liability could have been imposed upon the insured. *See Fortson v. St. Paul Fire & Marine Insurance Co.*, 751 F.2d 1157, 1159 (11th Cir.1985); *see also Hernandez*, 489 F.2d at 724 (direct action is one against insurer alleging damage "for which [insured] is legally responsible") (*quoting Vines v. United States Fidelity & Guaranty Co.*, 267 F.Supp. 436, 438 (E.D.Tenn.1967)). However, under the Texas workers'

compensation scheme, an employer who purchases insurance is *not* legally responsible for injuries to employees, whose only cause of action lies against the insurer. Tex.Civ.Stat.Ann. art. 8306, § 3(a) (Vernon Supp.1988); *City of Austin v. Powell*, 321 S.W.2d 924, 930 (Tex.Civ.App.–Austin 1959, writ ref'd n.r.e.). Essentially, appellant contends that in *Hernandez* we correctly defined "direct action," but failed to correctly apply the definition to the unique Texas system of workers' compensation.

Second, appellant argues that *Campbell* erred in applying § 1332(c) to an action brought *by* rather than *against* an insurer. Appellant relies principally on the Sixth Circuit's reasoning in *Aetna*, discussed above. To overrule *Campbell* on this ground would not disturb our decision in *Hernandez*.

Finally, appellant contends that the workers' compensation policy at issue in this case is not a "policy or contract of liability insurance" within the meaning of § 1332(c). Appellant defines the term "liability insurance" as "an indemnity agreement which protects the insured against his liability to others." *Twin City Fire Insurance Co. v. Wilkerson*, 247 F.Supp. 766, 767 (E.D.Tenn.1965); *see also Hernandez*, 489 F.2d at 722 ("contracts which provide for indemnity against liability") (*quoting Vines v. United States Fidelity & Guaranty Co.*, 267 F.Supp. 436, 437 (E.D.Tenn.1967)). Again relying on the rule that an employer in Texas who purchases workers' compensation insurance is not liable to his employees, appellant asserts

that Texas workers' compensation insurance policies cannot be considered "liability insurance" within the meaning of § 1332(c).[3]

Campbell already stands on weak jurisprudential legs in this Circuit. In *Dairyland Insurance Co. v. Makover*, 654 F.2d 1120 (5th Cir. Unit B Sept.1981), an insurance company brought a declaratory judgment action in federal court, seeking a determination of whether its policy covered a particular automobile accident. The majority determined that § 1332(c) did not apply, meaning the district court had subject matter jurisdiction. *Id.* at 1125. In so holding, the majority limited *Campbell* to its facts, arguing that the case "must be understood within the peculiar context of the de novo appeal procedure under Texas workmen's compensation law." *Id.* at 1124. Under the Texas statute, even though the insurer brings the appeal, the reviewing court conducts a trial de novo with the burden of proof remaining on the claimant.[4] *Id.* The dissent argued that *Campbell* was indistinguishable. *Id.* at 1128.

Campbell was again distinguished in *Evanston Insurance Co. v. Jimco, Inc.*, 844 F.2d 1185 (5th Cir.1988), another declaratory judgment action by an insurer seeking a

---

3. Appellant concedes that an employer in Texas who does not subscribe to workers' compensation insurance will be liable to employees for injuries on a common law negligence theory. Arguably, then, even under Texas law, workers' compensation insurance is "liability insurance," since purchasing the policy relieves the employer of potential liability to injured employees. However, appellant correctly asserts that these policies are not indemnity agreements.

4. *See supra* note 2.

determination of a policy's coverage. In *Evanston*, the panel affirmed the district court's decision that § 1332(c) only applies to a "direct action 'against' the insurer," *id.* at 1188, apparently adopting the Sixth Circuit's reading of the statute in the *Aetna* decision. Again, the court distinguished *Campbell* on the ground that because of the "unusual state appellate procedure" of the Texas workers' compensation statute, the overall proceeding could be seen as a claim by the worker against the insurance company, even though the insurance company brought the federal action. *Id.* at 1189.

After *Dairyland* and *Evanston*, the law in this circuit appears to be that *Campbell* and the proviso to § 1332(c) will only be applied to bar a diversity action by an insurer where the insurer is appealing a decision under the Texas workers' compensation statute. It may well be that we should reconsider both *Campbell* and *Hernandez* as appellant requests. However, this panel does not have that authority. It is a settled rule in the Fifth Circuit that a panel's decision may only be overruled by the court sitting en banc. Therefore, as long as *Campbell* remains good law, the district court's decision to dismiss this action for lack of subject matter jurisdiction must be AFFIRMED.

United States Court of Appeals
For the Fifth Circuit

No. 88-2238
Summary Calendar

D.C. Docket No. P-87-33-CA

NORTHBROOK NATIONAL
INSURANCE COMPANY,
Plaintiff-Appellant,

versus

LARRY W. BREWER,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT
[Filed Sept. 13, 1988]

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

September 13, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

NORTHBROOK NATIONAL INSURANCE COMPANY	)	
v.	)	CIVIL ACTION
LARRY W. BREWER	)	NO. P-87-33-CA

MEMORANDUM OPINION
[Filed Mar. 1, 1988]

The present case is a worker's compensation suit brought by Northbrook National Insurance Company ("Northbrook") to set aside an award of the Industrial Accident Board of the State of Texas. Defendant, Larry Brewer, claims to have been injured while he was working for Whitmire Line Clearance, Inc. ("Whitmire"), a Texas corporation. Northbrook is Whitmire's worker's compensation insurance carrier and is an Illinois corporation with its principal place of business in Illinois. Brewer received an award from the Industrial Accident Board, and Northbrook seeks to set it aside. Northbrook bases jurisdiction on diversity of citizenship. Defendant has moved to have this case transferred or remanded to State District Court in Lamar County, Texas, asserting that diversity is lacking due to the applicability of 20 U.S.C. § 1332(c).

Initially, it must be pointed out that transfer or remand to state court is not a proper remedy for defendant. This is an original suit brought by Northbrook and if subject matter jurisdiction is lacking, dismissal is the appropriate disposition.

In this case, diversity jurisdiction exists unless 28 U.S.C. § 1332(c) is applicable. Section 1332(c) provides in part:

> That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

This passage in section 1332(c) was adopted in response to state laws allowing direct actions against liability insurers by persons injured in motor vehicle accidents. *Hernandez v. Traveler's Insurance Co.*, 489 F.2d 721, 723 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974).

In *Hernandez*, the court held that a citizen of Texas employed by a Texas resident could not bring a worker's compensation suit against the employer's worker's compensation insurance carrier under diversity jurisdiction because of section 1332(c). *Id.* In *Campbell v. Insurance Company of North America*, 552 F.2d 604 (5th Cir. 1977) (per curiam), the court extended *Hernandez* to worker's compensation suits brought by the insurance carrier against the injured worker. In the opinion of this Court, these decisions do not represent an appropriate application of section 1332(c), *see Aetna Casualty and Surety Co. v. Green*, 606 F.2d 123 (6th Cir. 1979), however, they are binding on this Court and dictate a dismissal of this action for lack of subject matter jurisdiction.

An order has been signed separately and simultaneously of even date herewith.

Signed this 1st day of March, 1988.

/s/ Paul Brown
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

NORTHBROOK NATIONAL INSURANCE COMPANY	)	
v.	)	CIVIL ACTION NO. P-87-33-CA
LARRY W. BREWER	)	

ORDER

[Filed Mar. 1, 1988]

For the reasons expressed in the Memorandum Opinion filed of even date herewith, the present action is dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Signed this 1st day of March, 1988.

/s/ Paul Brown
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

NORTHBROOK NATIONAL INSURANCE COMPANY	)	
VS.	)	NO. P-87-33-CA
LARRY W. BREWER	)	

COMPLAINT

[Filed May 27, 1987]

TO THE HONORABLE JUDGE OF SAID COURT;

Northbrook National Insurance Company, Plaintiff, hereby files the following Complaint against Larry W. Brewer, the Defendant, and for cause of action would respectfully show the Court as follows:

I.

This is an Appeal from a final Award rendered by the Texas Industrial Accident Board on a compensation claim filed by Larry W. Brewer

Plaintiff, Northbrook National Insurance Company, is a corporation incorporated under the laws of the State of Illinois having its principal place of business in the State of Illinois.

The Defendant, Larry W. Brewer, is a citizen of the State of Texas.

The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

II.

On April 4, 1986, Larry W. Brewer was an employee of Whitmire Line Clearance, Inc. Northbrook National

Insurance Company provided Workers' Compensation Insurance for Whitmire Line Clearance, Inc. Larry W. Brewer claims to have sustained compensable injuries under the Workers' Compensation Act of the State of Texas on or about April 4, 1986 while working for Whitmire Line Clearance, Inc. in Lamar County, Texas, and in the course of his employment for said concern.

III.

Larry W. Brewer's claim for workers' compensation benefits was filed and processed by the Texas Industrial Accident Board on May 14, 1987, in Board No. 86-104643-N1, the Texas Industrial Accident Board rendered its final award and decision on said claim. Within twenty days of the date of the above award, Northbrook National Insurance Company filed notice with the Industrial Accident Board of its intent to appeal said Award. All jurisdictional requirements for Appeal of the foregoing Board Award have been complied with by Northbrook National Insurance Company.

IV.

Northbrook National Insurance Company denies that Larry W. Brewer is entitled to the amount of compensation claimed by him under the Workers' Compensation Act of the State of Texas, and denies that he is entitled to the aforesaid Award of the Industrial Accident Board.

V.

The above-described Award of the Texas Industrial Accident Board should be set aside, and judgment should be rendered that Larry W. Brewer take nothing of and from Northbrook National Insurance Company.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Summons issue and that upon final hearing this Court set aside the aforesaid award of the Texas Industrial Accident Board, and render its judgment and decree that Larry W. Brewer recover nothing of and from Northbrook National Insurance Company by reason of his aforesaid workers' compensation claim, that Northbrook National Insurance Company recover its costs in this behalf expended, and for such other and further relief, general and special, legal and equitable, to which Northbrook National Insurance Company may be justly entitled.

Respectfully submitted,

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ATTORNEY FOR NORTHBROOK NATIONAL INSURANCE COMPANY

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JAN 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-995

(2)

In The

Supreme Court of the United States

October Term, 1988

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT LARRY W. BREWER'S BRIEF IN OPPOSITION TO CERTIORARI

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1305

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals was correct in holding that the District Court did not commit error in dismissing Petitioner's claim for lack of subject matter jurisdiction.

LIST OF PARTIES AND RULE 28.1 LIST

Respondent incorporates by reference the List of Parties found at p. ii of the Petition for Writ of Certiorari filed herein.

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No. 88-995

In The

Supreme Court of the United States

October Term, 1988

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT LARRY W. BREWER'S BRIEF IN OPPOSITION TO CERTIORARI

OPINIONS BELOW

The Opinion of the Fifth Circuit Court of Appeals is reported at 854 F.2d 742 and is attached to Petitioner's Appendix at pages A-1 through A-9. The Opinion of the United States District Court for the Eastern District of Texas, Paris Division, was not reported but is attached to Petitioner's Appendix at pages A-11 through A-13.

JURISDICTION

Petitioner's sole ground for invoking this Court's jurisdiction is 28 U.S.C. Section 1254(1). As discussed below, there is no actual conflict between the circuits on the same matter and, accordingly, certiorari is not proper.

STATUTES AND RULES OF PROCEDURE INVOLVED

28 U.S.C. Section 1332 states in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between–

(1) Citizens of different States; . . .

* * *

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

Sup.Ct.R. 17 provides in pertinent part:

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only

when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings; or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

COUNTERSTATEMENT OF THE CASE

This case involves the Texas Worker's Compensation Statutes. Respondent Larry W. Brewer brought an action, pursuant to the Texas state regulatory scheme, before the Texas Industrial Accident Board. Petitioner Northbrook National Insurance Company appealed the award, filing its claim in the United States District Court as a purported "test case" rather than proceeding through the Texas courts.

Texas law is well settled that diversity jurisdiction does not exist in such instances. *Hernandez v. Travelers Insurance Co.*, 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974); *Campbell v. Insurance Co. of North America*, 552 F.2d 604 (5th Cir. 1977). Petitioner's proceeding challenging the existing law is based solely upon the Sixth Circuit's ruling regarding jurisdiction in a worker's compensation case under Tennessee law. *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979).

Petitioner's "test case" argument rests squarely upon this alleged conflict among the circuits.

REASONS FOR DENYING THE WRIT

The writ sought by Petitioner should be denied on two separate grounds. First, there is no actual conflict of decisions on the same matter and, accordingly, no important ground for granting certiorari. Second, the Fifth Circuit has correctly decided this case on the merits.

THERE IS NO IMPORTANT GROUND FOR GRANTING CERTIORARI

Supreme Court Rule 17 notes that review by writ of certiorari is not a matter of right, but one of sound judicial discretion. Therefore, certiorari should be granted only in cases where there are special and important reasons for Supreme Court review. This Court has held in the case of *Rice v. Sioux City Memorial Hospital Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) at p. 74 U.S. that "special and important reasons imply a reach to a problem beyond the academic or the episodic." Further, this Court stated in that opinion that certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . ." *Id.* at p. 79.

A traditional and accepted basis for certiorari is grounded upon a conflict among the circuits. In the instant case, this is the only basis upon which Petitioner

attempts to proceed in this Court. The purported conflict, as alleged by Petitioner, is actually such an "academic or . . . episodic" problem as discussed by this Court in *Rice*. A conflict among the circuits is not created because the Fifth Circuit has ruled on a question involving the *Texas* worker's compensation scheme in a fashion contrary to the Sixth Circuit's ruling involving the *Tennessee* worker's compensation scheme. To the contrary, it should be anticipated that the different circuits will necessarily construe certain issues differently under entirely different state statutory schemes.

This very distinction was the basis of this Court's ruling in *Ruhlin v. New York Life Ins. Co.*, 58 S.Ct. 860, 304 U.S. 202, 82 L.Ed. 1290 (1938). There, this Court noted that the Rules indicate that the Court will consider as a reason for granting a writ of certiorari the fact that "a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals *on the same matter*" (emphasis added). It was particularly noted, in addition, that as to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari. *Id.* at 304 U.S. 206. As in the instant case, the Court noted in *Ruhlin* that:

> "No decision at the present time could reconcile any conflict of circumstance, or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law."

Id. at 304 U.S. 206.

Petitioner's characterization of the instant facts as involving a conflict among the circuits simply ignores the

fact that two entirely different state statutes are involved. Both the Fifth and the Sixth Circuits have noted in their respective opinions that each is applying a specific state statutory scheme. What the facts do *not* demonstrate is any instance of the circuit courts ruling in a conflicting fashion on the "same matter." *See,* Sup.Ct.R. 17(1)(a).

As an example of the differences in the state regulatory schemes, the Sixth Circuit expressly noted in its opinion in *Greene* that under the Tennessee statutes both the employer and its compensation insurance carrier are real parties in interest. While, for purposes of federal law, the employer is not an indispensable party to such a Tennessee suit, it is a "proper" party. *Greene,* at 125-126. Such is not the case under the Texas regulatory scheme, which expressly prohibits an insured employer from being joined as a party. *See,* Tex.Rev.Civ.Stat.Ann. art. 8306, sec. 3 (Vernon 1983).

This case presents no conflict among the circuits with regard to decisions on the "same matter." There is no important question of federal law which has not been, but should be, settled by this Court. This is a case where the Court should exercise its discretion by denying the writ.

THE DECISION BELOW IS CLEARLY CORRECT

This case is one which deals with a well settled and clear rule of Texas law. Petitioner has not even contended to the contrary, proceeding rather in an attempt to overturn the well-settled principles of Texas law under a "test case" banner. If adopted, Petitioner's position would effectively transfer an extensive worker's compensation

case load from the state courts to the federal courts. Congress has previously noted the burden which worker's compensation cases would impose upon federal courts. In 1958, 28 U.S.C. Section 1445 was enacted prohibiting the removal of worker's compensation cases to federal courts. The Judicial Conference of the United States had recommended the passage of this statute, noting that the case load of the federal courts had "greatly increased" as a result of such removals. *See, Hernandez* at 724 (citing Sen.Rep. 1830, 85 Cong.2d Sess. U.S. Code Cong. & Admin. News, p. 3105 [1958]). Noting this history, the court held in *Hernandez* that:

> "If Congress had wished to limit Section 1332(c) to tort actions or had wished to exclude workman's compensation suits from Section 1332, it would have been simple enough for it to have done so by appropriate language. Congress was familiar with the burden workman's compensation cases imposed upon federal courts.
>
> • • •
>
> "[W]hen the language of a congressional act is plain and specific, courts have no more license to shorten the reach of the act than to lengthen it."

Id. at 723-724.

Congress has specifically addressed the situation involved in this case in 28 U.S. Section 1332(c), providing that in any direct action against an insurance carrier, such insurance carrier shall be deemed a citizen of the state of which the insured is a citizen. Worker's compensation actions such as that involved in the instant case have consistently been held to be "direct actions" within the scope of this legislation under the application of Texas law. Such actions have been expressly held to be "against

the insurer" and to involve "liability insurance" within the framework of the statute. Each of the arguments now presented by Petitioner has been considered and rejected by the Fifth Circuit in its application of Texas law. Petitioner has raised no new issues whatsoever in support of its position that this established law should be abandoned. The rulings below are in accord with the established precedent of Texas law as applied by the Fifth Circuit. There is nothing in the record to suggest that the trial court's ruling was clearly erroneous and, on such a record, this Court should deny the writ.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari filed by Petitioner should be denied.

Respectfully submitted,

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REPLY

BRIEF

Supreme Court, U.S.
FILED
JAN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-995

In The

Supreme Court of the United States

October Term, 1988

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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No. 88-995

In The

Supreme Court of the United States

October Term, 1988

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER,

Respondent.

PETITIONER'S REPLY MEMORANDUM

The petitioner Northbrook National Insurance Company respectfully submits this reply memorandum in support of its petition for certiorari in this matter.

ARGUMENT

The respondent's effort to reconcile *Campbell v. Insurance Co. of North America*, 552 F.2d 604 (5th Cir. 1977), and *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979), is flawed. First, the express nature of the conflict between those cases has been recognized by both courts. Second, the asserted difference between the workers' compensation schemes involved in *Campbell* and *Greene* (the status of the employer as a proper party in

Tennessee but not in Texas), as well as other differences in the two schemes, is immaterial to the courts' disagreement as to whether the direct action provision applies to suits filed by a workers' compensation insurance carrier. Finally, neither this case nor *Campbell* nor *Greene* involved an application of state law; the existence *vel non* of federal subject-matter jurisdiction is always a question of federal law. This Court sits to ensure that diversity jurisdiction law is the same in Texas as it is in Tennessee.

The specter raised by the respondent of an avalanche of workers' compensation cases descending on the federal courts is easily exorcised. The holding sought by the petitioner in this case would open the federal courts only to those cases filed initially in federal court in advance of any filing in state court, in which the insurer and the claimant are of diverse citizenship but the employer and the claimant are not. While this is a significant body of cases, the bulk of the total workers' compensation caseload will continue to be handled by the state court system.

There is no categorical federal policy against workers' compensation litigation in federal courts. Indeed, the overriding federal policy in this area is that diversity jurisdiction over workers' compensation cases is to be circumscribed only in accordance with an express

statutory mandate. *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961). Such a mandate is lacking in this case.

Respectfully submitted,

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APPENDIX

Supreme Court, U.S.
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(5)

No. 88-995

In The

Supreme Court of the United States

October Term, 1988

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES
[District Court]

Date	*Proceedings*
5/27/87	ORIGINAL COMPLAINT
6/16/87	MOTION of deft TO REMAND
6/16/87	MEMORANDUM of deft in support of deft's mo to remand
6/16/87	ORIGINAL ANSWER subject to Motion to Remand
7/7/87	REQUEST of pltf for an oral hearing on deft's mo to remand
7/7/87	RESPONSE of pltf TO MOTION TO REMAND
7/14/87	NOTICE of Hr on Mo to Remand set for 8-3-87 at 10:30 A.M. in Paris, Tx cc: attys
7/29/87	AMENDED MOTION of deft to REMAND or alternatively DISMISS
8/3/87	HEARING in open court on Deft's mo to Remand: Pltf presents oral argument against deft's mo. Deft responds. Ct takes Mo under advisement.
3/1/88	MEMORANDUM OPINION that case is dismissed for lack of subject matter jurisdiction PB (3-1-88) cc: attys v17 p129
3/1/88	ORDER dismissing this case for lack of subject matter jurisdiction PB (s-3-1-88) cc: attys v17 p130
3/14/88	NOTICE OF APPEAL of Pltf (mailed transcript form to atty)

RELEVANT DOCKET ENTRIES
[Court of Appeals]

Date	*Proceedings*
3/29/88	Record on Appeal No. of Vols. 1
5/12/88	Brief for Appellant
5/12/88	Records Excerpts – Appellant
6/14/88	Brief for Appellee
6/30/88	Reply Brief for Appellant
7/28/88	Brief for Amicus Tx Trial Lawyers Assn.
9/13/88	Opinion Rendered
9/13/88	Flg. and Entg. Judgment
9/27/88	Petition for Rehearing (Appellant) (En Banc)
10/26/88	Response
12/21/88	Order Denying Rehearing w/o poll
1/3/89	Jdgt. as Mdt. Issd. to Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

NORTHBROOK NATIONAL INSURANCE COMPANY)
VS.) NO. P-87-33-CA
LARRY W. BREWER)

COMPLAINT
[Filed May 27, 1987]

TO THE HONORABLE JUDGE OF SAID COURT;

Northbrook National Insurance Company, Plaintiff, hereby files the following Complaint against Larry W. Brewer, the Defendant, and for cause of action would respectfully show the Court as follows:

I.

This is an Appeal from a final Award rendered by the Texas Industrial Accident Board on a compensation claim filed by Larry W. Brewer

Plaintiff, Northbrook National Insurance Company, is a corporation incorporated under the laws of the State of Illinois having its principal place of business in the State of Illinois.

The Defendant, Larry W. Brewer, is a citizen of the State of Texas.

The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

II.

On April 4, 1986, Larry W. Brewer was an employee of Whitmire Line Clearance, Inc. Northbrook National

Insurance Company provided Workers' Compensation Insurance for Whitmire Line Clearance, Inc. Larry W. Brewer claims to have sustained compensable injuries under the Workers' Compensation Act of the State of Texas on or about April 4, 1986 while working for Whitmire Line Clearance, Inc. in Lamar County, Texas, and in the course of his employment for said concern.

III.

Larry W. Brewer's claim for workers' compensation benefits was filed and processed by the Texas Industrial Accident Board on May 14, 1987, in Board No. 86-104643-N1, the Texas Industrial Accident Board rendered its final award and decision on said claim. Within twenty days of the date of the above award, Northbrook National Insurance Company filed notice with the Industrial Accident Board of its intent to appeal said Award. All jurisdictional requirements for Appeal of the foregoing Board Award have been complied with by Northbrook National Insurance Company.

IV.

Northbrook National Insurance Company denies that Larry W. Brewer is entitled to the amount of compensation claimed by him under the Workers' Compensation Act of the State of Texas, and denies that he is entitled to the aforesaid Award of the Industrial Accident Board.

V.

The above-described Award of the Texas Industrial Accident Board should be set aside, and judgment should be rendered that Larry W. Brewer take nothing of and from Northbrook National Insurance Company.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Summons issue and that upon final hearing this Court set aside the aforesaid award of the Texas Industrial Accident Board, and render its judgment and decree that Larry W. Brewer recover nothing of and from Northbrook National Insurance Company by reason of his aforesaid workers' compensation claim, that Northbrook National Insurance Company recover its costs in this behalf expended, and for such other and further relief, general and special, legal and equitable, to which Northbrook National Insurance Company may be justly entitled.

Respectfully submitted,

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ATTORNEY FOR NORTHBROOK NATIONAL INSURANCE COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

NORTHBROOK NATIONAL INSURANCE COMPANY	§	CIVIL ACTION NO.
v.	§	P-87-33-CA
LARRY W. BREWER	§	

RESPONSE TO MOTION TO REMAND

[Filed July 7, 1987]

Plaintiff Northbrook National Insurance Company ("Northbrook") respectfully responds to the Defendant's Motion to Remand in this action, stating as follows:

INTRODUCTORY STATEMENT

This case is governed by *Hernandez v. Travelers Insurance Co.*, 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974), and *Campbell v. Insurance Co. of North America*, 552 F.2d 604 (5th Cir. 1977) (per curiam). In *Hernandez*, the Fifth Circuit held that an action by an allegedly injured worker against a workers' compensation insurance carrier for recovery of workers' compensation benefits falls within the "direct action" proviso to 28 U.S.C. § 1332(c), which states:

> Provided further, that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

In *Campbell*, the Fifth Circuit extended *Hernandez* to actions by the compensation carrier against the alleged injured worker.

In the present case, Northbrook is a corporation organized under the laws of Illinois, having its principal place of business in the State of Illinois. The defendant Larry Brewer ("Brewer") is a citizen of the State of Texas. Brewer's employer, Whitmire Line Clearance, Inc. ("Whitmire"), to whom Northbrook issued a policy of workers' compensation insurance, is incorporated under the laws of the State of Texas. Thus, if the "direct action" proviso of § 1332(c) is applied, Northbrook is deemed to take on the citizenship of Whitmire, and there is no diversity of citizenship.

This action is a test case to determine the correctness of *Hernandez* and *Campbell*. The Sixth Circuit has held, contrary to *Campbell*, that an action such as the present does not come within the § 1332(c) proviso. *Aetna Casualty & Surety Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979). While this Court may be bound to follow *Hernandez* and *Campbell*, *e.g.*, *Bauer v. Orser*, 258 F. Supp. 338, 344 (D.N.D. 1966); *Rodriguez v. Coastal Ship Corp.*, 210 F. Supp. 38, 40 (S.D.N.Y. 1962), Northbrook urges:

(1) that this is not a "direct action" within the meaning of 28 U.S.C. § 1332(c);

(2) that this action is not "against" the insurer as specified by 28 U.S.C. § 1332(c); and

(3) that the insurance policy in this case is not "a policy or contract of liability insurance" under 28 U.S.C. § 1332(c).

ARGUMENT

I. THIS COURT HAS DIVERSITY JURISDICTION.

The "proviso" to 28 U.S.C. § 1332(c), quoted in the Introductory Statement above, was enacted in 1964. Its purpose was to alleviate the enormous caseloads faced by federal district courts in Louisiana and Wisconsin.[1] Those states had enacted "direct action" statutes, under which an injured party could pursue a tort action directly against the tortfeasor's liability insurance carrier, without joining the tortfeasor or first obtaining a judgment against him. The Supreme Court had held in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), that such "direct actions" could be filed in federal court if the requisite diversity of citizenship was present between the injured party and the insurance carrier. As a result, and particularly in light of an unusually liberal Louisiana state court rule regarding appellate reexamination of jury

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[1] *Ford Motor Co. v. Insurance Co. of North America*, 669 F.2d 421, 424 (6th Cir. 1982); *Henderson v. Selective Insurance Co.*, 369 F.2d 143, 149 (6th Cir. 1966); *White v. United States Fidelity & Guaranty Co.*, 356 F.2d 746, 747-48 (1st Cir. 1966); *Narvaez v. British American Insurance Co.*, 324 F. Supp. 1324, 1325 (D.P.R. 1971); *Adams v. State Farm Mutual Automobile Insurance Co.*, 313 F. Supp. 1349, 1351-52 (N.D. Miss. 1970); *Bourget v. Government Employees Insurance Co.*, 313 F. Supp. 367, 371 (D. Conn. 1970), *rev'd on other grounds*, 456 F.2d 282 (2d Cir. 1972); *see McMurry v. Prudential Property & Casualty Insurance Co.*, 458 F. Supp. 209, 210 (E.D. Mich. 1978) ("[t]he amendment is an attempt to provide a fairer, more logical jurisdictional basis unaffected by the anticipated side effects of law reform").

findings, the dockets of the federal courts in the direct action states were swamped with such cases.[2]

The response of Congress to this situation was to deem the insurance company defendant in a direct action to share the citizenship of its insured, thereby destroying diversity where the injured party and the insured were both local residents. Although this measure was roundly criticized by legal scholars, who believed a more appropriate solution to be an increase in the number of federal judgeships in the affected districts,[3] the proviso has persisted to this day.

The Fifth Circuit has held that the proviso is to be given the "broad interpretation it deserves in light of the harm Congress sought to remedy." *O.M. Greene Livestock Co. v. Azalea Meats, Inc.*, 516 F.2d 509, 510 (5th Cir. 1975). Nevertheless, that broad interpretation does not negate the statutory elements which must be present to defeat diversity jurisdiction. *A.J. Kellos Construction Co. v. Balboa Insurance Co.*, 495 F. Supp. 408, 412 (S.D. Ga. 1980). Those elements are: (1) a direct action (2) against (3) the insurer of a policy of liability insurance. None of the three statutory elements are present in this case.

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[2] S. Rep. No. 1308, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S. Code Cong. & Ad. News 2778; H.R. Rep. No. 1229, 88th Cong., 2d Sess. (1964); 110 Cong. Rec. 9313-17 (daily ed. Apr. 28, 1964).

[3] *See* Weckstein, *The 1964 Diversity Amendment: Congressional Indirect Action Against State "Direct Action" Laws*, 1965 Wis. L. Rev. 268; *see also* 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.77[4] (2d ed. 1986).

A. *This is Not a "Direct Action."*

"[T]he words 'direct action' were used to refer to statutes such as those in Louisiana and Wisconsin which allow a party injured by the negligence of an insured to pursue his right of action against the insurer alone." *White v. United States Fidelity & Guaranty Co.*, 356 F.2d 746, 747-48 (1st Cir. 1966).[4] "[U]nless the cause of action against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action." *Fortson v. St. Paul Fire & Marine Insurance Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985).[5] "Direct actions" are "those cases in which a party suffering injuries or damage for which another is legally responsible is entitled to bring suit against the other's liability insurer without joining the insured or first obtaining judgment against him." *Beckham v. Safeco Insurance Co.*, 691 F.2d 898, 901-02 (9th Cir. 1982).

A suit involving workers' compensation benefits simply does not meet these tests. Workers' compensation acts had been prevalent throughout the United States for many decades prior to the 1964 enactment of the § 1332(c) proviso; the Texas act, for example, dates from 1917. In 1958, Congress specifically addressed the problem of a

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[4] *Compare Bishop v. Allstate Insurance Co.*, 313 F. Supp. 875, 876 (W.D. Ark. 1970) ("direct action" refers only to tort direct action statutes), *with O.M. Greene Livestock Co. v. Azalea Meats, Inc.*, 516 F.2d at 510 ("direct action" need not be under statute).

[5] *Accord, Walker v. Firemans Fund Insurance Co.*, 260 F. Supp. 95, 96 (D. Mont. 1966).

proliferation of workers' compensation suits in the federal courts, eliminating removal jurisdiction of such suits. Pub. L. 85-554, § 5, 72 Stat. 415. Three years later, the Supreme Court held that original jurisdiction over workers' compensation actions remained unaffected by the amendment to the removal statute. *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961). Yet the legislative history of the 1964 proviso may be searched in vain for any indication that Congress perceived the filing of workers' compensation suits in federal courts to be a persistent evil requiring correction. To the contrary, the legislative history reflects a virtual preoccupation with the effects of specific tort statutes in Louisiana and Wisconsin, and a concern that the trend toward such statutes, if continued nationwide, might result in the breakdown of the federal court system.

The Fifth Circuit held in *Hernandez* that a workers' compensation suit is a "direct action" because it is a suit in which "a party claiming to have suffered injuries or damage for which another is legally responsible is entitled to sue the other's liability insur[e]r without joining the insured and without having first obtained a judgment against the insured." 489 F.2d at 724, *quoting Vines v. United States Fidelity & Guaranty Co.*, 267 F. Supp. 436, 438 (E.D. Tenn. 1967). With all respect to that learned court, that statement reflects a fundamental misconception of workers' compensation law as applied in Texas.

To being [sic] with, an employer in Texas can *never* be "legally responsible" for workers' compensation benefits. If the employer is a subscriber to workers' compensation insurance, and the employee has not given the employer

notice of his election to retain his common-law remedies,[6] then the right to compensation benefits from the carrier is exclusive, and the employer is not liable for such benefits or for any other relief (save exemplary damages for gross negligence resulting in wrongful death).[7] If, on the other hand, the employer is not a subscriber or the employee gives the statutory notice, then the employer may be liable if negligence is shown,[8] but the remedies available are those at common law.[9]

Just as compensation benefits are not provided by compensation carriers as damages "for which another is legally responsible," so they are not necessarily provided as damages *in lieu of those* "for which another is legally responsible." Compensation benefits are available where the employer was not negligent or otherwise at fault.[10] Indeed, such benefits are available even when the employee's injuries result from certain Acts of God,[11] or the intentional criminal act of a third person.[12] The sole requirement for compensability is that the injury has occurred within the course and scope of the worker's employment. Thus, in Texas, most compensation actions

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[6] *See* Tex. Rev. Civ. Stat. art. 8306, § 3a.

[7] *See* Tex. Rev. Civ. Stat. art. 8306, §§ 3, 5.

[8] *See* Tex. Rev. Civ. Stat. art. 8306, §§ 1(4), 4.

[9] *See, e.g., Harrison v. Harrison*, 597 S.W.2d 477 (Tex. Civ. App. – Tyler 1980, writ ref'd n.r.e.).

[10] *E.g., Parker v. Employers Mutual Liability Insurance Co.*, 440 S.W.2d 43, 45 (Tex. 1969).

[11] *See* Tex. Rev. Civ. Stat. art. 8306, § 1.

[12] *See, e.g., Commercial Standard Insurance Co. v. Marin*, 488 S.W.2d 861 (Tex. Civ. App. – San Antonio 1972, writ ref'd n.r.e.).

do not satisfy the requirement for a "direct action" that "the act for which liability is sought to be imposed against the insurance company is the same act for which liability could be imposed against the insured." *Bowers v. Continental Insurance Co.*, 753 F.2d 1574, 1576-77 (11th Cir.), *cert. denied*, 105 S. Ct. 3531 (1985), *quoting Spooner v. Paul Revere Insurance Co.*, 578 F. Supp. 369, 373 (E.D. Mich. 1984).

The *Hernandez* court relied on the district court decision in *Vines*, without recognizing the distinction between the Tennessee workers' compensation act involved in *Vines*, under which the employer *is* primarily liable for compensation benefits, and the Texas act, under which he *is not*. That distinction is fundamental; in states where the employer is liable, and insures that liability, workers' compensation cases against insurance carriers *are* "direct actions," *i.e.*, suits against an insurer for damages "for which another is legally responsible."[13] In contrast, however, in states such as Texas the insurer's liability is primary and not derivative of a similar liability on the part of the insured.

The *Hernandez* court purported to rely on a literal reading of the language of the proviso, and to disclaim

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[13] *See also Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123, 125-26 (6th Cir. 1979), noting the fact that Tennessee workers' compensation liability is joint and several between carrier and employer in support of its holding that a "direct action" was involved in a suit by an employee against a compensation carrier.

any attempt or power to deviate from that literal language in pursuit of a more meaningful result. 489 F.2d at 723-24. In doing so, however, it equated the phrase "direct action" with the truncated phrase "action." The reporters are replete with examples of actions which have been held not to be "direct actions" under the proviso.[14] The word "direct," which cannot be regarded as mere surplusage, refers to an action brought directly against the insurance carrier which might instead have been brought directly against the insured. As so construed, Texas workers' compensation actions do not qualify for that adjective.

B. *This Action is Not "Against" the Insurer.*

In *Campbell v. Insurance Co. of North America*, 552 F.2d 604, 605 (5th Cir. 1977), the Fifth Circuit eschewed the liberalism it had so fondly embraced in *Hernandez*, holding that a workers' compensation action (such as the present) brought *by* an insurer was in fact an action

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[14] *See, e.g., Fortson v. St. Paul Fire & Marine Insurance Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985) (*Stowers* claim for negligently causing excess judgment); *Bourget v. Government Employees Insurance Co.*, 313 F. Supp. 367, 371 (D. Conn. 1970) (same), *rev'd on other grounds*, 456 F.2d 282 (2d Cir. 1972); *White v. United States Fidelity & Guaranty Co.*, 356 F.2d 746, 747-48 (1st Cir. 1966) (post-judgment suit by insured); *Bishop v. Allstate Insurance Co.*, 313 F. Supp. 875, 876 (W.D. Ark. 1970) (suit on uninsured motorist coverage); *Adams v. State Farm Mutual Automobile Insurance Co.*, 313 F. Supp. 1349, 1351-52 (N.D. Miss. 1970) (same); *Inman v. MFA Mutual Insurance Co.*, 264 F. Supp. 727, 728 (E.D. Ark. 1967) (same); *Fidelity & Deposit Co. v. Southern Utilities, Inc.*, 524 F. Supp. 692, 693-94 (M.D. Ga. 1981) (declaratory judgment suit regarding coverage).

against the insurer within the meaning of the proviso. It enigmatically held that the distinction between actions against a compensation carrier (which are expressly included in the proviso) and actions by the carrier (which are not mentioned in the proviso) "is valid, but too thin." The court relied on considerations of policy, realism, and fairness, considerations it had rejected in *Hernandez*.

In *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979), the Sixth Circuit, expressly rejecting *Campbell*, set forth the arguments against the *Campbell* holding far more cogently than can the plaintiff in this case:

> Neither the legislative history nor the statutory language of the 1964 amendment supports the conclusion that its provisions were intended to apply to an action in which a liability insurer is the moving party. First, nowhere in the extensive history of the amendment is reference made to an action brought by such insurer. Rather, the history of the amendment indicates that Congress was concerned exclusively with so-called "direct actions" by injured parties. *See S. Rep. No.* 1308, 88th Cong., 2d Sess. 1 (1964). Further, it would be outside the rationale of the 1964 amendment to apply its provisions to an action in which a liability insurer is the plaintiff. When Congress decided to amend § 1332(c), it reasoned that the type of cases brought under the direct action statutes of Louisiana and Wisconsin "[did] not come within the spirit or intent . . . of the diversity jurisdiction of the Federal judicial system." *S. Rep. No.* 1308, 88th Cong, 2d Sess. 7 (1964); U.S. Code Cong. & Admin. News 1964, p. 2784. However, every case brought under these statutes was an action by an injured party in which both the injured party and the insured party were residents of the same state. Thus, the injured party in these cases always had the option of fully litigating his claims against the

insured party, a fellow resident, in his own local forum. In other words, the direct action procedure merely provided the injured party with the additional option of bringing a federal action, based on diversity jurisdiction, solely against the out-of-state insurer. Such situation is not analogous to the situation presented when an action is initiated by an insurance company. If, pursuant to § 1332(c), a liability insurer is denied access to the federal courts, the insurer is thereby forced to commence its action in a foreign jurisdiction, namely the local jurisdiction of the injured party. In this forum, the out-of-state insurer may, at least in theory, be subject to a local prejudice in favor of the injured resident. Because of this possibility of prejudice, direct actions brought by liability insurers, unlike direct actions brought by injured parties, lie squarely within "the spirit and the intent . . . of the diversity jurisdiction of the Federal judicial system." *See* 1 J. Moore, *Federal Practice and Procedure* ¶ 0.71. Finally, a court cannot apply § 1332(c) to actions brought *by* liability insurers when explicit statutory language directs that the section applies to " . . . direct action[s] *against* [such] insurer[s]. . . ." (Emphasis added.) No court is allowed to supplement a clear statutory provision such as § 1332(c), even when such supplement would produce beneficial results. To do so would exceed the court's power of statutory interpretation, and would encroach upon the congressional power to legislate.

606 F.2d at 127-28 (emphasis in original). *Accord, Atlantic Mutual Insurance Co. v. Mitchell*, 333 F. Supp. 70, 71 (N.D. Tex. 1971) (overruled in *Campbell*). This is simply not an action *against* an insurer.

C. *There is No "Liability Insurance" in This Case.*

Much of what has been said above with respect to "direct actions" applies to the third statutory requirement, that the policy in question be one of "liability

insurance." Such insurance involves "an indemnity agreement which protects the insured against his liability to others." *Twin City Fire Insurance Co. v. Wilkerson*, 247 F. Supp. 766, 767 (E.D. Tenn. 1965), *quoted in Vines*, 267 F. Supp. at 437, *and Greene*, 606 F.2d at 126. In Texas, workers' compensation insurance is not liability insurance, because it is not an indemnity agreement which protects the insured against his liability to others.

II. REMAND IS AN INAPPROPRIATE REMEDY IN THIS CASE.

Brewer argues that this Court lacks subject-matter jurisdiction, and urges that this action therefore be "remanded" to the District Court of Lamar County, Texas. This is a *non sequitur*. This action was originally filed in this Court, and is therefore not subject to a "remand" to any court. If the Court lacks subject-matter jurisdiction, the appropriate course of action is to dismiss the case, and not to transfer it to state court:

> Since the suit had not been instituted in the state court and [had not] come into the federal court by removal, it was not one that was subject to a remand, and there was no power otherwise in the federal court to make any transfer of it to the state court as a pending action.

Reynolds v. Wabash Railroad, 236 F.2d 387, 390 (8th Cir. 1956).

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Plaintiff Northbrook National Insurance Company respectfully prays that the Defendant's Motion to Remand be in all things denied, and for such other and further relief to which it may be entitled at law or in equity.

Respectfully submitted,

/s/ E. Thomas Bishop
E. THOMAS BISHOP
P. MICHAEL JUNG

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ATTORNEYS FOR PLAINTIFF

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

NORTHBROOK NATIONAL INSURANCE COMPANY	§	NO. P-87-3-CA
VS.	§	
LARRY W. BREWER	§	

DEFENDANT'S AMENDED MOTION TO REMAND OR ALTERNATIVELY DISMISS

[Filed July 29, 1987]

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant in the above styled and numbered cause moves the Court to remove or transfer the above matter to the District Court of Lamar County, Texas or in the alternative to dismiss this case for the lack of jurisdiction and for the following grounds:

I.

Defendant would respectfully show unto the Court that this is a worker's compensation case filed in this Court by Plaintiff insurance company after an award was made by the Industrial Accident Board of the State of Texas on 14th day of May, 1987.

II.

Defendant would show that the Federal Diversity Statute 28, U.S.C. Section 1332, was amended in 1964 to make an insurer a citizen of the State in which the insured is a citizen, thus, there is no diversity of citizenship in this case on which Plaintiff can predicate jurisdiction.

III.

Defendant was injured on April 4, 1986 in Lamar County, Texas as an employee of Whitmire Line Clearance, Inc., a corporation duly incorporated and existing under and by virtue of the laws under the State of Texas.

IV.

This cause of action should be remanded to the District Court of Lamar County, Texas, the county in which the injury occurred and the county in which this Defendent is a resident or in the alternative dismissed for lack of jurisdiction.

WHEREFORE, Defendant prays the cause be remanded to the State Judicial District Court of Lamar County, Texas or in the alternative, that this Court dismiss this case for the lack of jurisdiction and that the Award of the Industrial Accident Board of the State of Texas be final.

SMITH, JOHNSON & McDOWELL

By /s/ Coy Johnson
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ATTORNEY FOR DEFENDANT
STATE BAR NO. 10698000

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

NORTHBROOK NATIONAL INSURANCE COMPANY	§	NO. P-87-3-CA
VS.	§	
LARRY W. BREWER	§	

DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S AMENDED MOTION TO REMAND OR ALTERNATIVELY DISMISS

[Filed July 29, 1987]

INTRODUCTION: This is a worker's compensation case.

I.

On April 4, 1986, Larry W. Brewer was an employee at Whitmire Line Clearance, Inc., and was working within the scope of his employment for said company when he received an injury, resulting in this worker's compensation claim. The injury occurred in Lamar County, Texas. Whitmire Line Clearance, Inc., is a corporation incorporated under the laws of the State of Texas. This employer carried a policy of worker's compensation insurance with Northbrook National Insurance Company which is a foreign corporation.

II.

The Plaintiff Insurance Company appealed the award by the Industrial Accident Board of the State of Texas, said award being dated the 14th day of May, 1987. Timely notice of intent not to abide by the award was given and

suit was filed by the Plaintiff Insurance Company in this Honorable Court, to set aside the Industrial Accident Board's Award.

III.

Defendant has filed his Motion For Remand or Alternatively Dismissal of this cause for lack of jurisdiction and as reasons therefor submits as authority for same as follows:

Defendant would show that the Federal Diversity Statute 28, U.S.C. Section 1332, was amended in 1964 to make an insurer a citizen of the State in which the insured is a citizen, thus, there is no diversity of citizenship in this case on which Plaintiff can predicate jurisdiction.

28 USC Section 1332 provides that in a worker's compensation case, the insurance company issuing the policy is deemed a citizen of the same state of which the insured, including the injured employee, is a citizen for purposes of determining diversity of citizenship. See *Hernandez v. Travelers Ins. Co.*, C.A.Tex. 1973, 489 F.2d 721, rehearing denied 493 F.2d 664, certiorari denied 95 S.Ct. 78, 419 U.S. 844, 42 L.Ed. 2d 73; 468 F.2d 1207, *Mrs. Veronica Fannaly Williams v. Liberty Mutual Insurance Company* and *Castillo vs. Allied Insurance Company*, 537 S.W. 2nd, 486. In these cases, suit was brought in Federal Court to set aside an award by the Industrial Accident Board and in each case it was held that the Defendant Insurance Company was of the same standing and was a citizen of the state in which the employee resided and, therefore, there was a lack of diversity of citizenship,

thus, a lack of jurisdiction by the Federal Court in which the case was filed. As stated in the *Castillo* case, 537 S.W. 2nd, 486 at Page 487 . . . "The federal diversity statute, 28 U.S.C., Sec. 1332 was amended in 1964 to make an insurer a citizen of the state in which the insured is a citizen. Thus, there was no diversity of citizenship on which Plaintiff could predicate jurisdiction of her 1973 federal suit. *Hernandez vs. Travelers Insurance Company*, 489 F.2d, 721 (5th Cir. 1974). The provisions of art 8307a apply only where the case is filed in a Court having jurisdiction of the subject matter of the litigation. *Federal Underwriters Exchange vs. Pugh*, 141 Tex. 539, 174 S.W. 2d, 598, 600 (1943), mandate conformed to, 176 S.W. 2d, 761. *Price vs. Continental Casualty Company*, 229 S.W. 2d, 887 (Tex.Civ.App.-Eastland 1950, no writ). When Plaintiff first filed her suit in a Court having jurisdiction of the subject matter, the mandatory and jurisdictional time requirement of art. 8307, Sec. 5, had long since expired. She cannot now be in "substantial compliance" with art. 8307a."

IV.

Attached is an Affidavit of Defendant's Counsel in support of this Motion.

WHEREFORE, premises considered, Defendant prays that this cause of action be removed and transferred or remanded to the State Judicial District Court in Lamar County, Texas, or in the alternative dismissed and that the Defendant be discharged herein with his costs and for such other further relief, general and special, either at

law or equity, to which Defendant may show himself justly entitled.

Respectfully submitted,

SMITH, JOHNSON & McDOWELL

By /s/ Coy Johnson
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ATTORNEY FOR DEFENDANT
STATE BAR NO. 10698000

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

NORTHBROOK NATIONAL INSURANCE COMPANY	§	
VS.	§	NO. P-87-3-CA
LARRY W. BREWER	§	

AFFIDAVIT

[Filed July 29, 1987]

STATE OF TEXAS	§
COUNTY OF HOPKINS	§

I, Coy Johnson, being duly sworn, deposed and says:

I.

I am an attorney who represents Defendant, Larry W. Brewer, herein and makes this Affidavit in support of Defendant's Amended Motion to Remand or Alternatively Dismiss and the instant action to the State District Court of Lamar County, Texas.

II.

This is a worker's compensation case wherein the Defendant was injured on April 4, 1986 while an employee of Whitmire Line Clearance, Inc. Whitmire Line Clearance, Inc., the employer is a corporation duly incorporated and existing under and by virtue of the laws of the State of Texas.

III.

Whitmire Clearance Line, Inc. had a policy of worker's compensation insurance issued by Northbrook National Insurance Company at the time of when the injury occurred on April 4, 1986.

IV.

I declare under penalty of purgery [sic] that the statements in the above Affidavit are true and correct.

/s/ Coy Johnson
COY JOHNSON

[Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

NORTHBROOK NATIONAL INSURANCE COMPANY	)	
	)	CIVIL ACTION
v.	)	NO. P-87-33-CA
LARRY W. BREWER	)	

MEMORANDUM OPINION

[Filed Mar. 1, 1988]

The present case is a worker's compensation suit brought by Northbrook National Insurance Company ("Northbrook") to set aside an award of the Industrial Accident Board of the State of Texas. Defendant, Larry Brewer, claims to have been injured while he was working for Whitmire Line Clearance, Inc. ("Whitmire"), a Texas corporation. Northbrook is Whitmire's worker's compensation insurance carrier and is an Illinois corporation with its principal place of business in Illinois. Brewer received an award from the Industrial Accident Board, and Northbrook seeks to set it aside. Northbrook bases jurisdiction on diversity of citizenship. Defendant has moved to have this case transferred or remanded to State District Court in Lamar County, Texas, asserting that diversity is lacking due to the applicability of 20 U.S.C. § 1332(c).

Initially, it must be pointed out that transfer or remand to state court is not a proper remedy for defendant. This is an original suit brought by Northbrook and if subject matter jurisdiction is lacking, dismissal is the appropriate disposition.

In this case, diversity jurisdiction exists unless 28 U.S.C. § 1332(c) is applicable. Section 1332(c) provides in part:

> That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

This passage in section 1332(c) was adopted in response to state laws allowing direct actions against liability insurers by persons injured in motor vehicle accidents. *Hernandez v. Traveler's Insurance Co.*, 489 F.2d 721, 723 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974).

In *Hernandez*, the court held that a citizen of Texas employed by a Texas resident could not bring a worker's compensation suit against the employer's worker's compensation insurance carrier under diversity jurisdiction because of section 1332(c). *Id.* In *Campbell v. Insurance Company of North America*, 552 F.2d 604 (5th Cir. 1977) (per curiam), the court extended *Hernandez* to worker's compensation suits brought by the insurance carrier against the injured worker. In the opinion of this Court, these decisions do not represent an appropriate application of section 1332(c), *see Aetna Casualty and Surety Co. v. Green*, 606 F.2d 123 (6th Cir. 1979), however, they are binding on this Court and dictate a dismissal of this action for lack of subject matter jurisdiction.

An order has been signed separately and simultaneously of even date herewith.

Signed this 1st day of March, 1988.

/s/ Paul Brown
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

NORTHBROOK NATIONAL INSURANCE COMPANY	)	
	)	CIVIL ACTION
v.	)	NO. P-87-33-CA
LARRY W. BREWER	)	

ORDER

[Filed Mar. 1, 1988]

For the reasons expressed in the Memorandum Opinion filed of even date herewith, the present action is dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Signed this 1st day of March, 1988.

/s/ Paul Brown
UNITED STATES DISTRICT JUDGE

NORTHBROOK NATIONAL INSURANCE COMPANY,
Plaintiff-Appellant,

v.

Larry W. BREWER,
Defendant-Appellee.

No. 88-2238.

United States Court of Appeals,
Fifth Circuit.

Sept. 13, 1988.

—

Appeal from the United States District Court for the Eastern District of Texas.

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Larry Brewer is a Texas citizen. Alleging an injury sustained in the course of his employment, Brewer filed a workers' compensation claim with the Texas Industrial Accident Board. Brewer works for Whitmire Line Clearance, Inc., a Texas corporation. Whitmire's workers' compensation insurer, Northbrook National Insurance Company is incorporated and maintains its principal place of business in Illinois. On May 14, 1987, the Board rendered a final award on Brewer's claim.

Northbrook filed this action against Brewer in federal district court on May 27, 1987, appealing the Board's compensation award. Brewer moved to remand the case to state court on the ground that the federal court lacked

diversity jurisdiction due to the following proviso of 28 U.S.C. § 1332(c) (emphasis supplied):

> *[I]n any direct action against the insurer of a policy or contract of liability insurance,* whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.[1]

Noting that remand would be an inappropriate remedy, the district court dismissed the action for lack of subject matter jurisdiction, reluctantly relying on *Hernandez v. Travelers Insurance Co.*, 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844, 95 S.Ct. 78, 42 L.Ed.2d 73 (1974) and *Campbell v. Insurance Company of North America*, 552 F.2d 604 (5th Cir.1977) (per curiam). The district court stated its opinion that "these decisions do not represent an appropriate application of section 1332(c)," citing *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir.1979), but applied them nevertheless as binding precedent.

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1. In cases not subject to this proviso, a corporation will be deemed for purposes of diversity jurisdiction and removal of a citizen of the states where it is incorporated and has its principal place of business. 28 U.S.C. § 1332(c). The proviso makes it possible for a corporation which falls within its terms to be deemed a citizen of three states rather than just two.

Legislative Purpose Behind the § 1332(c) Proviso

Section 1332(c) was amended in 1964, the quoted proviso being added in response to direct action statutes adopted in Louisiana and Wisconsin. S.Rep. No. 1308, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin.News 2778, 2779. Normally, a state law tort claim between residents of the same state would fall within the exclusive jurisdiction of the state courts. A direct action statute allows the injured party to bring suit directly against the insurer without joining the local tort-feasor, thus, when it is an out-of-state insurance company creating diversity jurisdiction where none existed before. As a result, the federal courts in the eastern district of Louisiana ended up with by far the heaviest caseload per judge of any district in the United States as new cases flooded in. *Id.* at 2779-81. The purpose of Congress' amendment to § 1332(c) was "to eliminate under the diversity jurisdiction of the U.S. district courts, suits on certain tort claims in which both parties are local residents, but which, under a State 'direct action' statute, may be brought directly against a foreign insurance carrier without joining the local tort-feasor as a defendant." *Id.* at 2778-79.

Fifth Circuit Application of § 1332(c) to Workers' Compensation Cases

In *Hernandez*, this court applied the § 1332(c) proviso to a workers' compensation claim filed by a Texas citizen against his employer's out-of-state insurance carrier, requiring the action to be dismissed for lack of subject matter jurisdiction. 489 F.2d at 722. We held that a suit filed against an insurer under a workers' compensation

statute is a "direct action" within the meaning of § 1332(c), *id.* at 723, despite the unique Texas statute which does not allow the employee to sue his employer directly, but relegates him to an action against the insurer. *Id.* at 724. We further held that workers' compensation insurance is a " 'policy or contract of [liability] insurance' within the meaning of § 1332(c)" *Id.* at 723.

In *Campbell*, the shoe was on the other foot. 552 F.2d at 605. An insurance company sought to appeal a workers' compensation award by the Texas Industrial Accident Board by filing an action in federal court. *Id.* at 604. *Hernandez* controlled entirely except for the circumstances that here the insurer brought the action rather than the claimant. *Id.* at 605. We recognized this distinction as "valid, but too thin" to merit a different result from *Hernandez*. *Id.* First, we suggested that the same policy considerations apply regardless of whether the claimant or the insurer brings the action. *Id.* Second, we recognized that the overall proceeding was in the nature of a claim by the injured workman against the insurer,[2]

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2. The Texas statute governing workers' compensation appeals provides:

> If the final order of the [Industrial Accident] Board is against the Association, the Association and not the employer shall bring suit to set aside said final ruling and decision of the Board, if it so desires, and *the court shall in either event determine the issues* in such cause, instead of the Board, *upon trial de novo, and the burden of proof shall be upon the party claiming compensation.*

Tex.Civ.Stat.Ann. art. 8307, § 5 (Vernon Supp.1988) (emphasis added).

and noted that the district court had formally realigned the parties below. *Id.* Finally, we argued that to construe the statute as the insurer asked would provide a federal forum for a dissatified insurer, but not for the claimant. This result we took as a evidence that the statute should be interpreted otherwise. *Id.*

Sixth Circuit Reaction: The Aetna *Case*

The Sixth Circuit in *Aetna* squarely rejected our holding in *Campbell*. 606 F.2d at 127. *Aetna* involved a declaratory judgment action brought by an insurer seeking to settle any workers' compensation claims arising out of an employee's accident. *Id.* at 125. The Sixth Circuit agreed with us that a workers' compensation suit is a "direct action" under § 1332(c) and that workers' compensation insurance falls within the meaning of "liability insurance." *Id.* at 125-26. Thus, the *Aetna* court had no difficulty with our decision in *Hernandez*. *See id.* at 127. However, they refused to follow *Campbell* in applying § 1332(c) to actions brought *by* rather than *against* an insurance company. *Id.* The Sixth Circuit argued first that Congress in the legislative history of § 1332(c) was concerned only with suits brought by injured parties and never mentioned suits brought by insurance companies. *Id.* Second, they believed that distinguishing between foreign insurers and local claimants falls within the "spirit" of diversity jurisdiction by providing a federal forum to an out-of-state insurer who "may, at least in theory, be subject to a local prejudice in favor of the injured resident." *Id.* Finally, in their opinion the *Campbell* decision violated the explicit language of § 1332(c), which applies only to suits *against* an insurance company. *Id.* The Sixth Circuit argued:

> No court is allowed to supplement a clear statutory provision such as § 1332(c), even which such supplement would produce beneficial results. To do so would exceed the court's power of statutory interpretation, and would encroach upon the congressional power to legislate.

Id. at 127-28.

Appellant's Contentions

Appellant does not deny that the district court properly interpreted *Hernandez* and *Campbell* in dismissing its claim. Indeed, this case appears to be identical to *Campbell* in all material respects. Instead, appellant brings this action as a "test case," asking us to overrule either *Campbell* alone or both *Campbell* and *Hernandez*. Appellant levels three attacks upon our reasoning in those cases, any one of which, if accepted, would lead to the conclusion that the § 1332(c) proviso does not apply to bar its federal court action against Brewer.

First, appellant contends that an action under Texas' workers' compensation laws is not a "direct action" within the meaning of § 1332(c). Appellant argues that "direct action" is a term of art, referring to a suit brought directly against the insurer when liability could have been imposed upon the insured. *See Fortson v. St. Paul Fire & Marine Insurance Co.*, 751 F.2d 1157, 1159 (11th Cir.1985); *see also Hernandez*, 489 F.2d at 724 (direct action is one against insurer alleging damage "for which [insured] is legally responsible") (*quoting Vines v. United States Fidelity & Guaranty Co.*, 267 F.Supp. 436, 438 (E.D.Tenn.1967)). However, under the Texas workers'

compensation scheme, an employer who purchases insurance is *not* legally responsible for injuries to employees, whose only cause of action lies against the insurer. Tex.Civ.Stat.Ann. art. 8306, § 3(a) (Vernon Supp.1988); *City of Austin v. Powell*, 321 S.W.2d 924, 930 (Tex.Civ.App.–Austin 1959, writ ref'd n.r.e.). Essentially, appellant contends that in *Hernandez* we correctly defined "direct action," but failed to correctly apply the definition to the unique Texas system of workers' compensation.

Second, appellant argues that *Campbell* erred in applying § 1332(c) to an action brought *by* rather than *against* an insurer. Appellant relies principally on the Sixth Circuit's reasoning in *Aetna*, discussed above. To overrule *Campbell* on this ground would not disturb our decision in *Hernandez*.

Finally, appellant contends that the workers' compensation policy at issue in this case is not a "policy or contract of liability insurance" within the meaning of § 1332(c). Appellant defines the term "liability insurance" as "an indemnity agreement which protects the insured against his liability to others." *Twin City Fire Insurance Co. v. Wilkerson*, 247 F.Supp. 766, 767 (E.D.Tenn.1965); *see also Hernandez*, 489 F.2d at 722 ("contracts which provide for indemnity against liability") (*quoting Vines v. United States Fidelity & Guaranty Co.*, 267 F.Supp. 436, 437 (E.D.Tenn.1967)). Again relying on the rule that an employer in Texas who purchases workers' compensation insurance is not liable to his employees, appellant asserts

that Texas workers' compensation insurance policies cannot be considered "liability insurance" within the meaning of § 1332(c).[3]

Campbell already stands on weak jurisprudential legs in this Circuit. In *Dairyland Insurance Co. v. Makover*, 654 F.2d 1120 (5th Cir. Unit B Sept.1981), an insurance company brought a declaratory judgment action in federal court, seeking a determination of whether its policy covered a particular automobile accident. The majority determined that § 1332(c) did not apply, meaning the district court had subject matter jurisdiction. *Id.* at 1125. In so holding, the majority limited *Campbell* to its facts, arguing that the case "must be understood within the peculiar context of the de novo appeal procedure under Texas workmen's compensation law." *Id.* at 1124. Under the Texas statute, even though the insurer brings the appeal, the reviewing court conducts a trial de novo with the burden of proof remaining on the claimant.[4] *Id.* The dissent argued that *Campbell* was indistinguishable. *Id.* at 1128.

Campbell was again distinguished in *Evanston Insurance Co. v. Jimco, Inc.*, 844 F.2d 1185 (5th Cir.1988), another declaratory judgment action by an insurer seeking a

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3. Appellant concedes that an employer in Texas who does not subscribe to workers' compensation insurance will be liable to employees for injuries on a common law negligence theory. Arguably, then, even under Texas law, workers' compensation insurance is "liability insurance," since purchasing the policy relieves the employer of potential liability to injured employees. However, appellant correctly asserts that these policies are not indemnity agreements.

4. *See supra* note 2.

determination of a policy's coverage. In *Evanston*, the panel affirmed the district court's decision that § 1332(c) only applies to a "direct action 'against' the insurer," *id.* at 1188, apparently adopting the Sixth Circuit's reading of the statute in the *Aetna* decision. Again, the court distinguished *Campbell* on the ground that because of the "unusual state appellate procedure" of the Texas workers' compensation statute, the overall proceeding could be seen as a claim by the worker against the insurance company, even though the insurance company brought the federal action. *Id.* at 1189.

After *Dairyland* and *Evanston*, the law in this circuit appears to be that *Campbell* and the proviso to § 1332(c) will only be applied to bar a diversity action by an insurer where the insurer is appealing a decision under the Texas workers' compensation statute. It may well be that we should reconsider both *Campbell* and *Hernandez* as appellant requests. However, this panel does not have that authority. It is a settled rule in the Fifth Circuit that a panel's decision may only be overruled by the court sitting en banc. Therefore, as long as *Campbell* remains good law, the district court's decision to dismiss this action for lack of subject matter jurisdiction must be AFFIRMED.

United States Court of Appeals
For the Fifth Circuit

No. 88-2238
Summary Calendar

D.C. Docket No. P-87-33-CA

NORTHBROOK NATIONAL
INSURANCE COMPANY,
Plaintiff-Appellant,

versus

LARRY W. BREWER,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT
[Filed Sept. 13, 1988]

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

September 13, 1988

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
APR 15
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-995

In The

Supreme Court of the United States

October Term, 1988

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR THE PETITIONER

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April 13, 1989

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QUESTIONS PRESENTED

The "direct action proviso" to 28 U.S.C. § 1332(c) applies to direct actions against an insurer of a policy or contract of liability insurance. Where these conditions are satisfied, the direct action proviso deems the insurer to share the citizenship of its insured for diversity jurisdiction purposes.

The questions presented in this case are:

(1) Under the direct action proviso, which was enacted in response to certain state tort statutes permitting direct actions against insurance carriers in lieu of actions against the parties insured by them, is a workers' compensation suit a "direct action" in a state in which it could not have been filed directly against the employer-insured?

(2) Despite the direct action proviso's clear and unambiguous reference to suits "against" insurers, does the proviso apply to a workers' compensation suit filed *by* an insurer *against* an allegedly injured employee to obtain an adjudication of non-liability?

(3) Under the direct action proviso, is a policy of workers' compensation insurance a policy of "liability insurance" in a state in which employers bear no liability for workers' compensation benefits?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner Northbrook National Insurance Company and the respondent Larry W. Brewer.

Petitioner Northbrook National Insurance Company is a member of the Allstate Group of insurance companies. Its parent corporation is Allstate Insurance Company, whose parent corporation is Sears, Roebuck & Company. Its affiliates are:

Allstate Automobile and Fire Insurance Company, Ltd.
Allstate County Mutual Insurance Company
Allstate Indemnity Company
Allstate Insurance Company of Canada
Allstate Life Insurance Company
Allstate Life Insurance Company of Canada
Allstate Life Insurance Company of New York
Allstate Property and Casualty Insurance Company
Allstate Reinsurance Company, Ltd.
Lincoln Benefit Life Company
Northbrook Indemnity Company
Northbrook Life Insurance Company
Northbrook Property and Casualty Insurance Company
PMI Insurance Company
PMI Mortgage Insurance Company
Seibu Allstate Life Insurance Company, Ltd.
Surety Life Insurance Company

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Hernandez v. Travelers Insurance Co., 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974) 5, 6, 14, 15, 17

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Tuck v. United Services Automobile Association, 859 F.2d 842 (10th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3592 (U.S. Jan. 24, 1989) (No. 88-1234) 14, 23

Twin City Fire Insurance Co. v. Wilkerson, 247 F. Supp. 766 (E.D. Tenn. 1965) 23

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110 Cong. Rec. 9316 (daily ed. Apr. 28, 1964) (remarks of Rep. Boggs) 10

H.R. Rep. No. 1229, 88th Cong., 2d Sess. (1964) 9

S. Rep. No. 1308, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S. Code Cong. & Ad. News 2778 9

ADMINISTRATIVE MATERIALS

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Tex. Admin. Code §§ 61.5-61.95 4

SECONDARY SOURCES

Barker, *Insurance Litigation, Diversity Jurisdiction, and the "Direct Action" Proviso*, 35 Fed'n Ins. Couns. Q. 225 (1985) 16, 17

3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1941) 11

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13B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3629 (1984) 9

No. 88-995

In The

Supreme Court of the United States

October Term, 1988

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (J.A. 31-39) is reported at 854 F.2d 742. The memorandum opinion of the United States District Court for the Eastern District of Texas (J.A. 27-29) has not been reported.

JURISDICTION

The judgment of the Court of Appeals (J.A. 40) was entered on September 13, 1988. No petition for rehearing was filed. The petition for a writ of certiorari was timely filed on December 12, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

As applicable to this case,[1] 28 U.S.C. § 1332 states in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between –
>
> (1) citizens of different States; . . . .
>
> • • •
>
> (c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

[1] This statute was amended by the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 202(a), 102 Stat. 4642, 4646 (1988), but the amendment applies only to actions filed in or removed to federal court on or after May 18, 1989, *id.*, § 202(b). The amendments to the quoted provision are in any event merely stylistic.

Pertinent sections of the Texas Workers' Compensation Act are reproduced as an appendix to this brief.

STATEMENT OF THE CASE

The petitioner Northbrook National Insurance Company ("Northbrook") is a corporation organized under the laws of the State of Illinois, with its principal place of business in that state. (J.A. 3). The respondent Larry W. Brewer ("Brewer") is a citizen of the State of Texas. (*Id.*). Northbrook provided workers' compensation insurance for Brewer's employer Whitmire Line Clearance, Inc. ("Whitmire"), which is a Texas corporation. (J.A. 3-4, 25-26).

Under the Texas Workers' Compensation Act, an employee who suffers a disabling on-the-job injury is required to report that injury to his employer or to the employer's workers' compensation insurance carrier within thirty days, unless the employer or carrier already has notice of the injury. Tex. Rev. Civ. Stat. art. 8307, § 4a. Upon notice of such an injury, the employer is required to file a report of the injury with the Texas Industrial Accident Board ("the Board") within eight days. *Id.*, § 7. The employee then has one year from the date of injury (or from the date of the employer's report to the Board, if

that report is untimely, *id.*, § 7a) in which to file a claim for compensation with the Board. *Id.*, § 4a.

Following a summary administrative process, *see* Tex. Admin. Code §§ 61.5-61.95, 49.5-49.165, the Board renders its decision on the employee's claim, Tex. Rev. Civ. Stat. art. 8307, § 5, which is termed an "award" whether or not a recovery is awarded to the employee. Any party dissatisfied with the Board's award may give notice to the Board, within twenty days after the award, of unwillingness to abide by the Board's decision. *Id.* Within twenty days after giving such notice, the dissatisfied party must bring suit to set aside the award. *Id.* Suit may be brought in the county where the injury occurred, or in the county where the employee resided at the time the injury occurred. Tex. Rev. Civ. Stat. art. 8307a. The trial of the suit is *de novo*, with the burden of proof on the party seeking compensation. Tex. Rev. Civ. Stat. art. 8307, § 5. The Board award is not admissible in evidence. *E.g., Tanner v. Texas Employers' Insurance Association*, 438 S.W.2d 395, 398 (Tex. Civ. App. – Beaumont 1969, writ ref'd n.r.e.).

In Texas, an employer is not liable to its employees for workers' compensation benefits; instead, claimants must "look for compensation solely to the association [*i.e.*, the carrier] . . . ." Tex. Rev. Civ. Stat. art. 8306, § 3(a).[2]

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[2] *Accord, City of Austin v. Powell*, 321 S.W.2d 924, 930 (Tex. Civ. App. – Austin 1959, writ ref'd n.r.e.) ("in a claim for compensation the injured employee has no action against his employer but against the insurance carrier").

Thus a Texas workers' compensation suit is between the claimant and the carrier, Tex. Rev. Civ. Stat. art. 8307, § 5; the employer is not a proper party to such a suit. *E.g., Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 702 (5th Cir. 1963) (applying Texas law).

In the present case, Brewer allegedly suffered a disabling on-the-job injury while working for Whitmire on April 4, 1986. (J.A. 4). His claim for workers' compensation benefits was processed by the Board, which made its award on May 14, 1987. (*Id.*). Northbrook gave timely notice to the Board of its unwillingness to abide by the Board's decision, and thereafter timely filed the present suit. (*Id.*).

As the party to whom Texas law gave the choice of forum, Northbrook chose to file the suit in federal district court on the basis of diversity of citizenship between Northbrook as plaintiff and Brewer as defendant. Brewer moved to "remand" to state court, or alternatively to dismiss, on the ground of lack of subject matter jurisdiction. (J.A. 19-20). His motion relied on the "direct action" proviso of 28 U.S.C. § 1332(c) as destroying diversity, since if the proviso were applicable, Whitmire's Texas citizenship would be imputed to Northbrook. (*Id.*)

The district court denied "remand" but dismissed the case for lack of subject matter jurisdiction. (J.A. 27-30). In doing so, it noted and followed two binding Fifth Circuit precedents: *Hernandez v. Travelers Insurance Co.*, 489 F.2d 721 (5th Cir.) (workers' compensation suit by injured worker is a "direct action" on a policy of "liability insurance" under § 1332(c)), *cert. denied*, 419 U.S. 844 (1974); and *Campbell v. Insurance Co. of North America*, 552 F.2d

604 (5th Cir. 1977) ("direct action" proviso applies to workers' compensation suit filed by insurance carrier"). The district court stated, however, that in its opinion, "these decisions do not represent an appropriate application of section 1332(c) . . . ." (J.A. 28).

A panel of the Fifth Circuit, relying on *Hernandez* and *Campbell*, affirmed. It noted the conflict between *Campbell* and *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979) ("direct action" proviso inapplicable to workers' compensation suits by insurance carriers), and commented upon the "weak jurisprudential legs" on which *Campbell* already stood in the Fifth Circuit. (J.A. 38). Acknowledging that "[i]t may well be that we should reconsider both *Campbell* and *Hernandez* as appellant requests," the Fifth Circuit panel, applying the rule that only the Fifth Circuit sitting *en banc* may overrule a prior panel decision, felt obliged to affirm. (J.A. 39).

The Fifth Circuit declined to hear the case *en banc*. On February 27, 1989, this Court granted certiorari.

SUMMARY OF THE ARGUMENT

The legislative history of the "direct action" proviso of 28 U.S.C. § 1332(c) reveals a specific and limited remedial purpose unrelated to suits by insurers, and unrelated to workers' compensation suits in general. The direct action proviso was enacted as a response to enormous caseloads faced by federal courts in Louisiana. Such caseloads had been generated in part because of that state's direct action statute, which enabled local plaintiffs, whom

diversity jurisdiction was never intended to protect, to gratuitously choose federal courts for strategic reasons when filing tort suits. Congress feared that this phenomenon might spread if direct action statutes proliferated. There is no indication that suits filed by out-of-state insurers against local residents, or workers' compensation suits in general, were a matter of Congressional concern.

The essential nature of a "direct action" under the direct action proviso is that it is based on a derivative liability, being brought directly against the insurer when it could instead have been brought against the insured. In states such as Texas, in which employers are not liable for workers' compensation benefits and are not proper parties to workers' compensation suits, workers' compensation suits are not "direct actions" under the proviso.

A workers' compensation suit filed by an insurance carrier is not "against" the insurer within the meaning of the direct action proviso. As previously noted, the legislative history makes no reference to suits by insurers. In contradistinction to the gratuitous nature of a locally resident injured party's choice of a federal forum, an out-of-state insurer's choice of such a forum is a classic example of the use of diversity jurisdiction to avoid local prejudice. Application of the direct action proviso to suits by insurers would do unwarranted violence to the language employed by Congress in the proviso.

In a state in which employers are not liable for compensation benefits, workers' compensation insurance policies are not policies of "liability insurance," inasmuch as

they do not indemnify the insured for a liability owed to others.

No untoward consequences will arise from the proper application of the direct action proviso with respect to workers' compensation suits. An avalanche of such suits on the federal courts is unlikely, inasmuch as the decision in this case will affect only a small proportion of the total workers' compensation caseload. Nor will the outcome of this case deprive workers of their right to prompt adjudication of compensation claims. Even if such practical considerations were present, they would be forced to yield to Congress' determination to leave the federal courts open to certain classes of workers' compensation suits.

ARGUMENT

The "direct action" proviso of 28 U.S.C. § 1332(c) imputes the citizenship of a nonparty-insured to a party-insurer only when three elements are present: (1) a "direct action" (2) against (3) the insurer of a policy or contract of liability insurance. Following a discussion of the nature, purpose, and legislative history of the direct action proviso, this brief will address the absence of each of these elements in a case brought by an insurer under the Texas Workers' Compensation Act.

I. THE DIRECT ACTION PROVISO HAD A SPECIFIC AND LIMITED REMEDIAL PURPOSE UNRELATED TO SUITS BY INSURERS, AND UNRELATED TO WORKERS' COMPENSATION SUITS IN GENERAL.

The direct action proviso was enacted in 1964. Its legislative history demonstrates conclusively that its purpose was to alleviate enormous caseloads faced by federal district courts in the State of Louisiana.[3] Louisiana and Wisconsin had enacted "direct action" statutes, under which an injured party could pursue a tort action directly against the tortfeasor's liability insurance carrier, without joining the tortfeasor or first obtaining a judgment against him. This Court had held in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), that such "direct actions" could be filed in federal court if the requisite diversity of citizenship and amount in controversy were present between the injured party and the insurance carrier. As a result of the *Elbert* holding, in

[3] S. Rep. No. 1308, 88th Cong., 2d Sess. (1964) (hereinafter "Senate Report"), *reprinted in* 1964 U.S. Code Cong. & Ad. News (hereinafter "USCCAN") 2778; H.R. Rep. No. 1229, 88th Cong., 2d Sess. (1964) (hereinafter "House Report"); 110 Cong. Rec. 9313-17 (daily ed. Apr. 28, 1964). This purpose is confirmed by the case authorities and commentators. *E.g., Ford Motor Co. v. Insurance Co. of North America*, 669 F.2d 421, 424 (6th Cir. 1982); *Torres v. Hartford Insurance Co.*, 588 F.2d 848, 849-50 (1st Cir. 1978); Note, *Federal Diversity Jurisdiction in Direct Actions – A Dispute Over the Application of Section 1332(c)*, 29 U. Kan. L. Rev. 143, 146-47 (1980); 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3629, at 671 (1984).

combination with an unusually liberal Louisiana state court rule regarding appellate reexamination of jury findings,[4] the dockets of the federal courts in Louisiana were swamped with direct actions filed by locally resident injured parties against out-of-state insurance companies.[5] Congress feared that the enactment of direct action statutes in other states might result in similar effects in other federal judicial districts.[6]

The Congressional response to this situation was to deem the insurance company defendant in a direct action to share the citizenship of its insured, thereby destroying diversity where the injured party and the insured are both local residents. This approach has been roundly criticized by legal scholars, who believe a more appropriate solution to have been an increase in the number of federal judgeships in the affected districts.[7] Nevertheless, the direct action proviso has persisted to this day.

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[4] Senate Report at 4, 1964 USCCAN 2781; House Report at 4; 110 Cong. Rec. 9315 (daily ed. Apr. 28, 1964) (remarks of Rep. Celler).

[5] Senate Report at 8-9, 1964 USCCAN 2783-84; House Report at 9; 110 Cong. Rec. 9316 (daily ed. Apr. 28, 1964) (remarks of Rep. Boggs).

[6] Senate Report at 2-6, 1964 USCCAN 2779-83; House Report at 3-7.

[7] *See* 1 J. Moore, J. Lucas, H. Fink, D. Weckstein, and J. Wicker, *Moore's Federal Practice* ¶ 0.77[4] (2d ed. 1987); Weckstein, *The 1964 Diversity Amendment: Congressional Indirect Action Against State "Direct Action" Laws*, 1965 Wis. L. Rev. 268, 274-81; Note, *supra* n.3, 29 U. Kan. L. Rev. at 146-47.

The legislative history of the direct action proviso reflects a Congressional belief that federal court jurisdiction over direct actions by injured parties against insurance carriers was an accidental by-product of the Louisiana and Wisconsin direct action statutes.[8] Congress' focus throughout its consideration of the proviso was upon the conduct of injured party plaintiffs who would, but for a direct action statute, be suing a co-citizen tortfeasor in the parties' home state court. Congress understandably concluded that such suits "do not come within the spirit or the intent of the basic purpose of the diversity jurisdiction,"[9] namely to protect out-of-state parties against actual or perceived local bias.[10]

The legislative history is bereft of any expression of Congressional concern regarding the filing of suits in federal courts by insurance carriers. Suits by insurers against injured parties are infrequent in comparison to tort actions by injured parties as plaintiffs; there is no indication that the filing of suits by insurers was contributing to the excessive federal caseloads which were being experienced in Louisiana. The legislative reports contain numerous specific references to suits "against" insurers, but none to suits by carriers. Moreover, as will be seen,

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[8] Senate Report at 4, 1964 USCCAN 2781; House Report at 4.

[9] Senate Report at 9, 1964 USCCAN 2784; House Report at 9.

[10] *E.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816); 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 533 (2d ed. 1941) (quoting James Madison).

see Section III, *infra*, the Congressional concern that direct actions against out-of-state insurers do not come within the spirit and intent of diversity and jurisdiction does not apply when the insurance carrier chooses the forum as plaintiff.

Likewise, Congress did not have workers' compensation suits in mind when it enacted the direct action proviso. The Congressional committees referred to the existence of "two States, namely Louisiana and Wisconsin, which have 'direct action' statutes."[11] Obviously, this list would have been much longer if workers' compensation statutes, which had been prevalent throughout the United States for many decades, had been considered to be "direct action" statutes. In 1958, Congress had specifically addressed the problem of a proliferation of workers' compensation suits in the federal courts, eliminating removal jurisdiction of such suits.[12] Three years later, this Court had held that original federal diversity jurisdiction over workers' compensation actions remained unaffected by the 1958 amendment. *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961). Yet the legislative history of the 1964 direct action proviso may be searched in vain for any indication that Congress perceived the filing of workers' compensation suits in federal courts as a persistent evil requiring further correction.

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[11] Senate Report at 2, 1964 USCCAN 2779; House Report at 2.

[12] 28 U.S.C. § 1445(C), as added by Pub. L. No. 85-554, § 5, 72 Stat. 415 (1958).

II. THIS IS NOT A "DIRECT ACTION."

The § 1332(c) proviso refers not merely to "actions," but to "direct actions." Invoking the familiar rule that each part of a statute must be given meaning, *e.g.*, *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), and bearing in mind the purpose of the proviso as reflected in its legislative history, *see* Section I, *supra*, the lower courts have developed a substantial and consistent body of jurisprudence which distinguishes between "direct actions" within the meaning of the proviso and other actions to which that label does not properly apply. This analytical framework forms a sound basis for administering the "direct action" proviso, but has not been properly employed by the Fifth Circuit insofar as workers' compensation actions are concerned.

"Direct action" is a term of art. *Evanston Insurance Co. v. Jimco, Inc.*, 844 F.2d 1185, 1188 (5th Cir. 1988). "[T]he words 'direct action' were used to refer to statutes such as those in Louisiana and Wisconsin which allow a party injured by the negligence of an insured to pursue his right of action against the insurer alone." *White v. United States Fidelity & Guaranty Co.*, 356 F.2d 746, 747-48 (1st Cir. 1966).[13] The distinguishing feature of such actions is their derivative nature: "[U]nless the cause of action against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action." *Fortson v. St. Paul Fire & Marine Insurance Co.*, 751 F.2d 1157, 1159 (11th

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[13] *Accord, Velez v. Crown Life Insurance Co.*, 599 F.2d 471, 473 (1st Cir. 1979).

Cir. 1985).[14] "Direct actions" are "those cases in which a party suffering injuries or damage *for which another is legally responsible* is entitled to bring suit against the other's liability insurer without joining the insured or first obtaining judgment against him." *Beckham v. Safeco Insurance Co.*, 691 F.2d 898, 901-02 (9th Cir. 1982) (emphasis supplied).

The Fifth Circuit held in *Hernandez v. Travelers Insurance Co.*, 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974), that a workers' compensation suit is a "direct action," reasoning that it is a suit in which "a party claiming to have suffered injuries or damage for which another is legally responsible is entitled to sue the other's liability insur[e]r without joining the insured and without having first obtained a judgment against the insured." 489 F.2d at 724, *quoting Vines v. United States Fidelity & Guaranty Co.*, 267 F. Supp. 436, 438 (E.D. Tenn. 1967). This broad reasoning blurs important distinctions among the workers' compensation schemes of the several states, and thereby misapplies the statute in the present case.

In many states, an employer is legally responsible for the payment of workers' compensation benefits to its employees, and insures that liability (voluntarily or pursuant to statutory command) by purchasing a policy of workers' compensation insurance. In such states, a suit by an injured employee against a workers' compensation

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[14] *Accord, e.g., Tuck v. United Services Automobile Association*, 859 F.2d 842 (10th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3592 (U.S. Jan. 24, 1989) (No. 88-1234); *Myers v. State Farm Insurance Co.*, 842 F.2d 705, 707 (3d Cir. 1988).

insurer may indeed be a "direct action," since it fits the analytical framework of a suit against an insurer for damages for which the insured is legally responsible.[15] In other states, such as Texas, however, an employer is not legally responsible for compensation benefits,[16] and is not even a proper party to a workers' compensation suit.[17] In those states, the insurer's liability is primary and not derivative of a similar liability on the part of the insured. Hence a workers' compensation action in such states is not a "direct action" of the type addressed by Congress in the direct action proviso.[18]

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[15] *See Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123, 125-26 (6th Cir. 1979), noting the fact that Tennessee worker's compensation liability is joint and several between carrier and employer in support of its holding that a "direct action" was involved in a suit by an employee against a compensation carrier under Tennessee law.

[16] Tex. Rev. Civ. Stat. art. 8306, § 3(a) ("such employees and their representatives and beneficiaries shall look for compensation solely to the association . . . "); *City of Austin v. Powell*, 321 S.W.2d 924, 930 (Tex. Civ. App. – Austin 1959, writ ref'd n.r.e.). *See also, e.g., Glass v. Stahl Specialty Co.*, 97 Wash. 2d 880, 652 P.2d 948, 952 (1982); *Greenleaf v. Puget Sound Bridge & Dredging Co.*, 58 Wash. 2d 647, 364 P.2d 796, 804 (1961); *Liberty Mutual Insurance Co. v. American Incinerator Co.*, 51 F. Supp. 739, 742 (S.D.N.Y. 1931).

[17] *E.g.*, Tex. Rev. Civ. Stat. art. 8307, § 5; *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 702 (5th Cir. 1963) (applying Texas law); *Transport Insurance Co. v. Jaeger*, 534 S.W.2d 389, 391 (Tex. Civ. App. – Houston [1st Dist.] 1976, writ ref'd n.r.e.); *Brown v. McMillan Material Co.*, 108 S.W.2d 914, 916 (Tex. Civ. App. – Eastland 1937, writ ref'd).

[18] "It does not appear that the *Hernandez* court was aware of the far-reaching ramifications of its ruling on this peculiarity

(Continued on following page)

An additional hallmark of a "direct action" is that "the act for which liability is sought to be imposed against the insurance company is the same act for which liability could be imposed against the insured." *Bowers v. Continental Insurance Co.*, 753 F.2d 1574, 1576-77 (11th Cir.), *cert. denied*, 473 U.S. 906 (1985). That is not the case with Texas workers' compensation actions. Under Texas law, compensation benefits are available irrespective of whether the employer would otherwise have been liable for the employee's injuries. Benefits are available, for example, where the employer was not negligent or otherwise at fault.[19] Benefits are even available where the employee's injuries resulted from certain Acts of God,[20] or from a deliberate assault by a third person.[21] The sole requirement for compensability is that the injury occur within the course and scope of the worker's employment.

(Continued from previous page)

of the Texas workmen's compensation system or the inconsistency of that ruling with the *Vines* construction and other settled doctrines based on that consideration." Barker, *Insurance Litigation, Diversity Jurisdiction, and the "Direct Action" Proviso*, 35 Fed'n Ins. Couns. Q. 225, 245 (1985).

[19] *E.g., Parker v. Employers Mutual Liability Insurance Co.*, 440 S.W.2d 43, 45 (Tex. 1969).

[20] Tex. Rev. Civ. Stat. art. 8309, § 1; *see, e.g., State Highway Department v. Kloppenberg*, 371 S.W.2d 793, 795 (Tex. Civ. App. – Houston [1st Dist.] 1963, writ ref'd n.r.e.).

[21] *E.g., Nasser v. Security Insurance Co.*, 724 S.W.2d 17, 19 (Tex. 1987); *Walters v. American States Insurance Company*, 654 S.W.2d 423, 426 (Tex. 1983).

The *Hernandez* court purported to rely on a literal reading of the language of the direct action proviso, and to disclaim any attempt or power to deviate from that literal language in pursuit of a more meaningful result. 489 F.2d at 723-24. In the name of literalism, however, the court ironically departed from the text of the statute by effectively equating the phrase "direct action" with the truncated phrase "action."[22] The reporters are replete with examples of "actions" involving liability insurers and workers' compensation insurers which have been held not to be "direct actions" under the proviso.[23] The

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[22] Barker, *supra* n.18, 35 Fed'n Ins. Couns. Q. at 245.

[23] These include: suits against the insurer on the policy itself, *see* n.32, *infra;* suits against the insurer for negligent failure to settle within policy limits, *e.g., Fortson v. St. Paul Fire & Marine Insurance Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985); *Beckham v. Safeco Insurance Co.*, 691 F.2d 898, 901-02 (9th Cir. 1982); suits against the insurer for bad faith or breach of fiduciary duty, *e.g., Jones v. National Union Fire Insurance Co.*, 664 F. Supp. 440, 442 n.1 (N.D. Ind. 1987); *Carpentino v. Transport Insurance Co.*, 609 F. Supp. 556, 558-59 (D. Conn. 1985); suits against the insurer for negligent failure to discover the insured's fraud in obtaining coverage, *John Cooper Produce, Inc. v. Paxton National Insurance Co.*, 774 F.2d 433, 435-36 (11th Cir. 1985); suits between insurers for contribution to a judgment or settlement, *e.g., Continental Casualty Co. v. Canadian Universal Life Insurance Co.*, 605 F.2d 1340, 1343 n.2 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); declaratory judgment actions brought by or against insurers, *e.g., Evanston Insurance Co. v. Jimco, Inc.*, 844 F.2d 1185, 1188-89 (5th Cir. 1988); and interpleader actions by an insurer against multiple claimants. *Home Indemnity Co. v. Moore*, 499 F.2d 1202, 1205 (8th Cir. 1974).

word "direct," which cannot be regarded as mere surplusage,[24] refers to an action brought directly against the insurance carrier which might instead have been brought indirectly against the insurance carrier by being brought directly against the insured. In Texas and other states with a similar statutory scheme, workers' compensation actions do not qualify for that adjective.

III. THIS ACTION IS NOT "AGAINST" THE INSURER.

"The starting point in every case involving construction of a statute is the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976).[25] This Court has favored literalism in the interpretation of the diversity jurisdiction statutes. In *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961), the Court, in determining that the district courts retained original diversity jurisdiction of workers' compensation suits notwithstanding the statutory elimination of removal jurisdiction over such suits, held that it "must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth." 367 U.S. at 352.

In *Campbell v. Insurance Co. of North America*, 552 F.2d 604, 605 (5th Cir. 1977), the Fifth Circuit eschewed the

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[24] *Lank v. Federal Insurance Co.*, 309 F. Supp. 349, 351 (D. Del. 1970); *Carvin v. Standard Accident Insurance Co.*, 253 F. Supp. 232, 233 (E.D. Tenn. 1966).

[25] *Accord, e.g., Consumer Products Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

literalism embraced by this Court in *Horton*, holding that a workers' compensation action (such as the present) brought *by* an insurer was in fact an action *against* the insurer within the meaning of the direct action proviso. It enigmatically held that the distinction between actions against an insurance carrier (which are expressly included in the proviso) and actions by the carrier (which are not mentioned in the proviso) "is valid, but too thin." 552 F.2d at 605. The *Campbell* court erred, by giving inadequate consideration to the statute's legislative history, by incorrectly analyzing the policy implications of its holding, and, perhaps most importantly, by doing extreme violence to the clear language of the statute.

In *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979), the Sixth Circuit expressly rejected *Campbell*. It began by noting that "nowhere in the extensive history of the amendment is reference made to an action brought by [an] insurer. Rather, the history of the amendment indicates that Congress was concerned exclusively with so-called 'direct actions' by injured parties." 606 F.2d at 127. This analysis is correct; as noted in Section I, *supra*, the Congressional focus in enacting the direct action proviso was on the fortuitous effect of "direct action" statutes in prompting federal filings by injured parties.

The Sixth Circuit next took sharp issue with the *Campbell* court's conclusion that it would somehow be unfair to afford a federal forum to an out-of-state insurer while denying such a forum to a resident employee:

> If, pursuant to § 1332(c), a liability insurer is denied access to the federal courts, the insurer is thereby

> forced to commence its action in a foreign jurisdiction, namely the local jurisdiction of the injured party. In this forum, the out-of-state insurer may, at least in theory, be subject to a local prejudice in favor of the injured resident. Because of this possibility of prejudice, direct actions brought by liability insurers, unlike direct actions brought by injured parties, lie squarely within "the spirit and the intent . . . of the diversity jurisdiction of the Federal judicial system."

606 F.2d at 127, *quoting* 1 J. Moore, *Moore's Federal Practice* ¶ 0.71.

The *Campbell* court artificially realigned the parties to avoid the effect of the statutory limitation to suits "against" insurers, viewing "the overall process as a whole" in a workers' compensation case as "a process initiated by the injured workman against the insurer . . . ." 552 F.2d at 605.[26] Although realignment of parties according to their true interests is a familiar concept in analyzing diversity jurisdiction in multi-party cases, *e.g.*, *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 69 (1941), that concept has never been applied in the diversity jurisdiction context to deem the party who selects the judicial forum to be other than a plaintiff,[27] and it would be illogical to do so in this case.

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[26] *See Evanston Insurance Co. v. Jimco, Inc.*, 844 F.2d 1185, 1189 (5th Cir. 1988) (explaining *Campbell* by reference to the "unusual state appellate procedure" under the Texas workers' compensation statute); *Dairyland Insurance Co. v. Makover*, 654 F.2d 1120, 1124 (5th Cir. Unit B Sept. 1981) (*Campbell* "must be understood within the peculiar context of the de novo appeal procedure under Texas workers' compensation law").

[27] The reversal of the identity of the plaintiff and defendant in federal question cases, *see Skelly Oil Co. v. Phillips*

(Continued on following page)

Under Texas law, forum selection is reserved to the party who initiates the judicial portion of the compensation claim process (*i.e.*, the nominal plaintiff), whether that party is the carrier or the employee.[28] As noted in Section I, *supra*, the direct action proviso was intended to circumscribe the initiating party's forum selection latitude in order to prevent local plaintiffs from gratuitously choosing the federal courts in preference to their own local state fora.[29] The out-of-state insurer's choice of a federal forum, on the other hand, is far from gratuitous, instead partaking of all of the classical incidents of diversity jurisdiction. In evaluating whom the action is "against," therefore, the controlling factor should be the alignment of the parties when the case is filed in court, not when it is filed before the administrative board, when it is tried to the jury,[30] or when the burden of proof is allocated.

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Petroleum Co., 339 U.S. 667, 673-74 (1950), rests upon different considerations, representing an effort to restrict federal jurisdiction to cases "arising under" federal law.

[28] *See, e.g.*, Tex. Rev. Civ. Stat. art. 8307a.

[29] *Cf. Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 56-57 (Frankfurter, J., concurring) (noting the gratuitous nature of such a choice).

[30] Although the parties to a Texas workers' compensation suit which has been filed by a carrier are often realigned before the jury to make the claimant the plaintiff, realignment in such a situation is a matter of discretion and not a matter of right. *Royal Insurance Co. v. Szuma*, 731 S.W.2d 953, 955 (Tex. App. – Fort Worth 1987, writ ref'd n.r.e.); *Texas Employers' Insurance Association v. Brown*, 226 S.W.2d 233, 235 (Tex. Civ. App. – Amarillo 1949, writ ref'd n.r.e.).

In *Greene*, the Sixth Circuit paid due respect to the statutory language, holding that "a court cannot apply § 1332(c) to actions brought *by* liability insurers when explicit statutory language directs that the section applies to '. . . direct action[s] *against* [such] insurer[s] . . . .' " 606 F.2d at 127-28 (emphasis in original).[31] In so holding, the Sixth Circuit, in contradistinction to the Fifth Circuit in *Campbell*, heeded the policy of strict construction established by this Court in *Horton*. A paraphrase of this Court's language from *Horton* reveals the remarkable similarity of this Court's rationale to that of the Sixth Circuit in *Greene*:

> Congress used language specifically barring [direct actions against insurers] and at the same time left unchanged the old language which just as specifically permits civil suits [by insurers] to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount. In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth. Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as [against the insurer], and it could easily do so still. [This Court should] therefore hold that under the present law the District Court has jurisdiction to try this civil case between citizens of different States if the matter in controversy is in excess of $10,000.

Cf. Horton v. Liberty Mutual Insurance Co., 367 U.S. at 352.

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[31] *Accord, Atlantic Mutual Insurance Co. v. Mitchell*, 333 F. Supp. 70, 71 (N.D. Tex. 1971) (overruled in *Campbell*); *Note, supra* n.3, 29 U. Kan. L. Rev. at 150 ("The Fifth Circuit's judicial 'revision' of the statute disregarded the actual language of section 1332(c)").

IV. THE INSURANCE POLICY IN THIS CASE IS NOT A "POLICY OR CONTRACT OF LIABILITY INSURANCE."

The third statutory requirement, that the policy in question be one of "liability insurance," overlaps substantially the requirement that the action be a "direct action." Under the direct action proviso, "liability insurance" involves "an indemnity agreement which protects the insured against his liability to others." *Twin City Fire Insurance Co. v. Wilkerson*, 247 F. Supp. 766, 767 (E.D. Tenn. 1965), *quoted in Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d at 126. In a state in which the employer is not liable for workers' compensation benefits, compensation insurance is not liability insurance, because it is not an "indemnity agreement" at all. Instead, it is first-party insurance, which the lower courts have uniformly and correctly held to fall outside the letter and spirit of the direct action proviso, even where (as in the case of uninsured motorist coverage) the loss arises out of some relationship with a third party.[32] There is thus no "liability insurance" in this case.

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[32] As to uninsured motorist coverage, *see, e.g., Tuck v. United Services Automobile Association*, 859 F.2d 842, 847 (10th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3592 (U.S. Jan. 24, 1989) (No. 88-1234); *Myers v. State Farm Insurance Co.*, 842 F.2d 705, 707 (3d Cir. 1988). As to other forms of first-party insurance, *see, e.g., Shiffler v. Equitable Life Assurance Society of United States*, 838 F.2d 78, 82 n.5 (3d Cir. 1988) (accident insurance); *Holland American Insurance Co. v. Succession of Roy*, 777 F.2d 992, 995 (5th Cir. 1985) (fire insurance); *Bowers v. Continental Insurance Co.*, 753 F.2d 1574, 1576 (11th Cir.) (PIP insurance), *cert. denied*, 473 U.S. 906 (1985); *Velez v. Crown Life Insurance Co.*, 599

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V. PROPER APPLICATION OF THE DIRECT ACTION PROVISO WITH RESPECT TO WORKERS' COMPENSATION SUITS WILL PRODUCE NO UNTOWARD RESULTS.

In urging affirmance in the court below, and in resisting certiorari in this Court, the respondent and an *amicus* have pointed to a "parade of horribles" which allegedly will result if the direct action proviso is held inapplicable to workers' compensation cases in states such as Texas, or to workers' compensation cases filed by insurers. To this contention two answers present themselves: that no such untoward results will occur; and that the Congressional grant of diversity jurisdiction cannot in any event be disregarded on the basis of administrative concerns.

The specter raised by the respondent of an avalanche of workers' compensation cases descending on the unprotected federal courts is easily exorcised. The Court's decision in this case will affect only a small fraction of all workers' compensation cases: those cases, initially filed in the federal court[33] in advance of any filing in state court,[34] in which the insurer and claimant

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F.2d 471, 473 (1st Cir. 1979) (life insurance); *Bodine's, Inc. v. Federal Insurance Co.*, 601 F. Supp. 47, 50 (N.D. Ill. 1984) (property, machinery, & business insurance); *Spooner v. Paul Revere Life Insurance Co.*, 578 F. Supp. 369, 373 (E.D. Mich. 1984) (disability insurance).

[33] Workers' compensation cases filed in state court are not removable. 28 U.S.C. § 1445(c).

[34] Where the federal action is filed after a similar state action has been filed, the federal action will often be abated pending the outcome of the state action. *See, e.g., Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 664 (1978); *Mahaffey v. Bechtel Associates Professional Corp., D.C.*, 699 F.2d 545, 546 (D.C. Cir. 1983).

are of diverse citizenship but the employer and the claimant are not.[35] Moreover, the decision will affect only compensation cases in states in which employers are not liable for compensation benefits, and compensation cases filed by insurers. Thus the bulk of the total workers' compensation caseload will continue to be handled by the state court system.

It was argued below that federal jurisdiction over workers' compensation cases would deprive injured workers of various procedural advantages obtainable in state courts, including statutory priority for workers' compensation cases.[36] This argument is, however, not specific to the applicability of the direct action proviso and, if accepted, would suggest that original diversity jurisdiction over workers' compensation cases be eliminated in derogation of this Court's decision in *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961).[37] In any event, there is no reason to believe that federal judges, armed with broad statutory discretion to manage their own dockets, *see* 28 U.S.C. § 1657(a), are incapable of dispensing timely and efficient justice to injured workers.

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[35] Cases in which the insurer and employer are both diverse from the claimant may be filed in federal court irrespective of the outcome of this case. Cases in which the insurer and claimant are not diverse may not be filed in federal court, again irrespective of the outcome of this case.

[36] *See* Tex. Gov't Code § 23.101(a)(4).

[37] Arguments such as those raised by the respondent in this case were rejected in the pre-*Horton* case of *Johnson v. United States Fidelity & Guaranty Co.*, 126 F. Supp. 84, 87 (E.D. Tenn. 1954).

This Court has noted on several occasions that Congress has plenary power (within the confines of Article III) to grant diversity jurisdiction to the federal district courts or to withhold it from them. *E.g., Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922); *Gaines v. Fuentes*, 92 U.S. 10 (1875). Where Congress has conferred such jurisdiction, the federal courts may not decline to exercise it merely to serve their own convenience. *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943). Although repeatedly urged to reduce the federal caseload through an outright abolition of diversity jurisdiction, Congress has consistently rebuffed these efforts, instead exercising considerable sensitivity and discernment in constricting diversity jurisdiction only in those areas least suited to its exercise.

There is no categorical federal policy against workers' compensation litigation in federal courts. Instead, the overriding federal policy in this area is that diversity jurisdiction over workers' compensation cases is to be circumscribed only in accordance with an express statutory mandate. *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961). Such a mandate being lacking in this case, proper application of the statute cannot be avoided by ephemeral fears of overburdened dockets or languishing cases.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals should be reversed and judgment should be rendered by this Court remanding the case to the district court for proceedings on the merits of the complaint.

Respectfully submitted,

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APPENDIX

Tex. Rev. Civ. Stat. art. 8306, § 3(a): The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for.

Tex. Rev. Civ. Stat. art. 8307, § 4a: Unless the association or subscriber have notice of the injury, no proceeding for compensation for injury under this law shall be maintained unless a notice of the injury shall have been given to the association or subscriber within thirty (30) days after the happening of an injury or the first distinct manifestation of an occupational disease, and unless a claim for compensation with respect to such injury shall have been made within one (1) year after the occurrence of the injury or of the first distinct manifestation of an occupational disease; or, in the case of death of the employee or in the event of his physical or mental incapacity, within one (1) year after death or the removal of such physical or mental incapacity. For good cause the Board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing of the claim before the Board.

Tex. Rev. Civ. Stat. art. 8307, § 5: All questions arising under this law, if not settled by agreement of the parties interested therein and within the provisions of this law, shall, except as otherwise provided, be determined by the

Board. Any interested party who is not willing and does not consent to abide by the final ruling and decision of said Board shall, within twenty (20) days after the rendition of said final ruling and decision by said Board, file with said Board notice that he will not abide by said final ruling and decision. And he shall within twenty (20) days after giving such notice bring suit in the county where the injury occurred, or in the county where the employee resided at the time the injury occurred (or, if such employee is deceased, then in the county where the employee resided at the time of his death), to set aside said final ruling and decision, and said Board shall proceed no further toward the adjustment of such claim, other than hereinafter provided. In all cases of occupational diseases, for the purpose of determining venue when an appeal is effected to set aside the final ruling and decision of the Board, suit shall be brought in a court of competent jurisdiction in the said county in which the employee was last exposed to the disease alleged, prior to the manifestation of the disease, or death therefrom, or in the county in which the adverse party resides, or has a permanent place of business, or by agreement of the parties in a court of competent jurisdiction in any county in this state. Whenever such suit is brought, the rights and liability of the parties thereto shall be determined by the provisions of this law, and the suit of the injured employee or person suing on account of the death of such employee shall be against the association, if the employer of such injured or deceased employee at the time of such injury or death was a subscriber as defined in this law. If the final order of the Board is against the Association, then the Association and not the employer shall bring

suit to set aside said final ruling and decision of the Board, if it so desires, and the court shall in either event determine the issues in such cause, instead of the Board, upon trial de novo, and the burden of proof shall be upon the party claiming compensation. . . .

* * *

Tex. Rev. Civ. Stat. art. 8307, § 7(a): Every subscriber shall keep a record of all injuries, fatal or otherwise, sustained by his employees in the course of their employment. After the occurrence of an accident resulting in an injury to an employee, causing his absence from work for more than one (1) day, or after the employee notifies the employer of a definite manifestation of an occupational disease, a written report thereof shall be made within eight (8) days following the employee's absence from work and notice thereof to the employer or notice of manifestation of an occupational disease to the Board on blanks to be procured from the Board for that purpose. The subscriber shall deliver a copy of the report to the association. Upon the termination of the incapacity of the injured employee, or if such incapacity extends beyond a period of sixty (60) days, the subscriber shall make a supplemental report upon blanks to be procured for that purpose.

Tex. Rev. Civ. Stat. art. 8307, § 7a: Where the association or subscriber has been given notice or the association or subscriber has knowledge of an injury or death of an employee and fails, neglects, or refuses to file a report thereof as required by the provisions of Section 7 of this Article, the limitation of Section 4a of this Article in respect to the filing of a claim for compensation shall not

begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the association or subscriber until such report shall have been furnished as required by Section 7 of this Article.

Tex. Rev. Civ. Stat. art. 8307a: Any interested party who is not willing and does not consent to abide by the final ruling and decision of the Industrial Accident Board, shall, in the manner and within the time provided by Section 5 of Article 8307, Revised Civil Statutes of 1925, file notice with said Board, and bring suit in the county where the injury occurred, or in the county where the employee resided at the time the injury occurred, or if such employee is deceased, then in the county where the employee resided at the time of his death to set aside said final ruling and decision; . . . .

Tex. Rev. Civ. Stat. art. 8309, § 1: The following words and phrases as used in this Act shall, unless a different meaning is plainly required by the context, have the following meanings, respectively:

* * *

"Association" shall mean the "Texas Employers' Insurance Association" or other insurance company authorized under this Act to insure the payment of compensation to injured employees or to the beneficiaries of deceased employees.

* * *

The term "injury sustained in the course of employment," as used in this Act, shall not include:

(1) An injury caused by an act of God, unless the employee is at the time engaged in the performance of duties that subject him to a greater hazard from an act of God responsible for the injury than ordinarily applies to the general public.

(2) An injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment.

(3) An injury received while in a state of intoxication.

(4) An injury caused by the employee's wilful intention and attempt to injure himself, or to unlawfully injure some other person, but shall include all other injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premises or elsewhere.

* * *

RESPONDENT'S

BRIEF

No. 88-995

Supreme Court, U.S.
FILED
JUN 16 1989
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CLERK

In The

Supreme Court of the United States

October Term, 1988

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR THE RESPONDENT

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the district court err in dismissing the case for want of federal diversity jurisdiction?

LIST OF PARTIES AND RULE 28.1 LIST

Respondent incorporates by reference the List of Parties found at p. ii of the Brief for the Petitioner filed herein.

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1 J. Moore, J. Lucas, H. Fink, D. Weckstein, and J. Wicker, *Moore's Federal Practice* ¶ 0.77[4] (2d ed. 1987) 7

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No. 88-995

In The

Supreme Court of the United States

October Term, 1988

NORTHBROOK NATIONAL INSURANCE COMPANY,

Petitioner,

v.

LARRY W. BREWER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The Opinion of the Fifth Circuit Court of Appeals is reported at 854 F.2d 742 and is found at page 31 of the Joint Appendix. The Opinion of the United States District Court for the Eastern District of Texas, Paris Division, was not reported, and is found at page 27 of the Joint Appendix.

JURISDICTION

Petitioner has properly invoked the jurisdiction of this Court under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1332 states in pertinent part:

(a) The district courts shall have the original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between –

(1) Citizens of different states; . . .

* * *

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the state of which the insured is a citizen, as well as of any state by which the insurer has been incorporated and of the state where it has its principal place of business.

COUNTERSTATEMENT OF THE CASE

This case involves the Texas Worker's Compensation Statutes. Respondent Larry W. Brewer brought an action, pursuant to the Texas state regulatory scheme, before the Texas Industrial Accident Board. Petitioner Northbrook National Insurance Company appealed the award, filing

its claim in the United States District Court as a purported "test case" rather than proceeding through the Texas courts.

Texas law is well settled that diversity jurisdiction does not exist in such instances. *Hernandez v. Travelers Insurance Co.*, 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974); *Campbell v. Insurance Co. of North America*, 552 F.2d 604 (5th Cir. 1977). Petitioner's proceeding challenging the existing law is based solely upon the Sixth Circuit's ruling regarding jurisdiction in a worker's compensation case under Tennessee law. *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979).

An analysis of these decisions supports the position adopted by the Fifth Circuit that diversity jurisdiction is not proper in such circumstances; accordingly, the dismissal of the case was proper.

SUMMARY OF THE ARGUMENT

Worker's compensation suits are particularly local in character. They involve a civil liability dispute between two residents of the same state, one of whom may have liability insurance coverage. Regardless of the existence of insurance coverage, the dispute remains a local dispute.

In 1964, Congress amended the provisions of 28 U.S.C. Section 1332(c), recognizing that federal diversity jurisdiction should not be enlarged to allow such local disputes to proceed in a federal forum. This decision was

consistent with federal policy generally, and was consistent with traditional notions that insurance legislation in particular should be left to the states.

By adopting a particularly narrow focus on the language of the 1964 amendment, the Petitioner in this case urges a departure from existing law which both enlarges federal diversity jurisdiction and creates a "race to the courthouse" situation, allowing the insurer a choice between federal and state forums while denying the injured party such a choice. Such a construction is not warranted by the Congressional intent underlying the 1964 amendment, and is not sound policy.

ARGUMENT

28 U.S.C. Section 1332(c) provides that in any direct action against an insurance carrier, the carrier shall be deemed a citizen of the state of which its insured is a citizen. Worker's compensation actions such as that involved in the instant case have consistently been held to be such "direct actions" within the scope of this legislation under the application of Texas law. Worker's compensation statutes, both generally and under the Texas statutes, involve disputes which are peculiarly local in character. The liability issue is one between a local employer and a local employee concerning an on the job injury. The existence of liability insurance, or worker's compensation insurance, has not been a traditional basis for federal diversity jurisdiction, and it should not be. The existence of insurance coverage does not change the local character of the liability issue.

If adopted, Petitioner's position would effectively transfer an extensive worker's compensation case load from the state courts to the federal courts. Both logic and policy dictate that such disputes should be resolved in a state forum, not a federal forum. Congress has previously noted the burden which worker's compensation cases would impose upon federal courts. In 1958, 28 U.S.C. Section 1445 was enacted prohibiting the removal of worker's compensation cases to federal courts. The Judicial Conference of the United States had recommended the passage of this statute, noting that the case load of the federal courts had "greatly increased" as a result of such removals. S. Rep. No. 1830, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. Code Cong. & Ad. News 3105. Noting this history, the Fifth Circuit held in *Hernandez v. Travelers Insurance Co.*, 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974):

> "If Congress had wished to limit Section 1332(c) to tort actions or had wished to exclude workman's compensation suits from Section 1332, it would have been simple enough for it to have done so by appropriate language. Congress was familiar with the burden workman's compensation cases imposed upon federal courts.
>
> * * *
>
> "[W]hen the language of a congressional act is plain and specific, courts have no more license to shorten the reach of the act than to lengthen it."

Id., at 723-724.

The 1964 amendment to Section 1332(c) was the congressional response to the jurisdictional dilemma created by new state direct action statutes. Local disputes such as that involved here had not traditionally been the subject

of federal jurisdiction. Since the direct action statutes arguably injected a new party, usually a nonresident insurance carrier, into the dispute, significant jurisdictional issues arose. By enacting the proviso to Section 1332(c), Congress expressed its desire *not* to enlarge federal jurisdiction, and its desire to have these essentially local disputes litigated in a state forum.

I. POLICY MATTERS UNDERLYING THE 1964 AMENDMENT

The Congressional goal behind the enactment of the Section 1332(c) proviso was to lighten the judicial case load in certain areas. Two states, Louisiana and Wisconsin, had "direct action" statutes which resulted in a disproportionately heavy case load in those districts. Senate Report No. 1308 of August 5, 1964, issued in connection with the proposed 1964 amendment to 28 U.S.C. Section 1332(c), noted that the case load per judgeship in the Eastern District of Louisiana was "150% greater than the national average . . . " The combination of the Louisiana direct action statute with the local practice of the Louisiana trial bar of opting for federal over state forums created the need for a remedy. Thus, the purpose of the proposed legislation to amend 28 U.S.C. Section 1332(c) was to eliminate from diversity jurisdiction suits on certain tort claims in which both parties were local residents, but which, under a state direct action statute, might be brought directly against one party's insurance carrier without joining the local tortfeasor. The Senate Report concluded that the Judiciary Committee believed the existence of these statutes in Louisiana and Wisconsin did not come within the spirit or the intent of the basic purpose

of the diversity jurisdiction of the federal judicial system and recommended passage of the amendment. U.S. Code Cong. & Ad. News 2778-2781, 2784, 2785 (1964).

Both sides of the jurisdictional debate have been strongly argued since the enactment of the proviso. *E.g.*, Wasson, *Diversity Jurisdiction in Reverse Direct Actions: Section 1332(c) and the Need for Legislative Verification*, 68 Ky. L. J. 57 (1979); and, *cf.* Weckstein, *The 1964 Diversity Amendment; Congressional Indirect Action Against State "Direct Action" Laws*, 1965 Wis. L. Rev. 268. No less an authority on federal procedure than Professor James W. Moore has joined the debate, taking the position advocated by Northbrook in the instant case. 1 *Moore's Federal Practice* ¶ 0.77[4].

Despite significant criticism, what remains clear is Congressional intent to limit federal diversity jurisdiction in this area. In an insurance dispute between two local parties, a direct action against a foreign insurer is insufficient to invoke federal jurisdiction. Although the legislative history of the 1964 amendment indicates that it was intended to bar direct actions "on certain tort claims in which both parties are local residents", the provision applies to some non-tort suits with equal force; this is particularly the case with worker's compensation actions. As described by the court in *Vines v. United States Fidelity & Guaranty Co.*, 267 F.Supp. 436 (D.C. Tenn. 1967), an action brought under the Tennessee worker's compensation statutes against the liability insurer of the employer without first obtaining a judgment against the employer or joining him as a party defendant was a "direct action" within the meaning of the proviso. The *Vines* court noted, importantly, that the proviso should not be subjected to a

restrictive application such as that advocated by Northbrook. Instead, it logically noted that for purposes of deciding whether an action was a "direct action" within the terms of the proviso, there was very little difference between an auto accident case, to which the proviso unquestionably applied, and a worker's compensation action, since in both instances the insurer could be sued directly if the state statutes so permitted. The court further noted there was no logical distinction between tort actions – the auto accident case – and a worker's compensation case more in the nature of a contract action, since Congress intended that wherever a party claiming to have suffered injuries for which another was legally responsible was entitled to sue the other's liability insurer without joining the insured and without having first obtained a judgment against the insured, the insurer was deemed a citizen of the state of the insured. To hold otherwise, the court reasoned, would potentially allow the same situation to develop in Tennessee, with regard to compensation cases, as developed in Louisiana with regard to auto accident cases, the situation prompting passage of the proviso in the first place. Such action would render partially ineffectual the specific remedy provided by Congress.

With the enactment of the 1964 proviso, Congress determined that a federal interest existed in freeing court dockets from cases concerned with establishing the liability of co-citizens. The direct action statutes brought the matter to a head, in reality creating artificial diversity jurisdiction in what is essentially a dispute between two local residents. The resultant clogging of the federal dockets was the specific problem Congress sought to

cure. *See*, Senate Report 1308, *supra.*, at 2784. Congress thus focused on the fact that the crux of the problem was that the issue to be resolved was the liability of one co-citizen to another, and enacted the proviso in order to abolish the artificial jurisdiction in such cases. Although the language ultimately adopted refers to suits "against" insurers, there is no indication that Congress intended a different result in what one commentator has called "reverse direct actions". *See*, Wasson, at 465. There is no evidence to support the belief that Congress intended to have the issue turn on which party won the race to the courthouse.

The federal interests are the same regardless of the alignment of the parties. Whichever party initiates the suit, the matter in controversy is the same, the liability of one co-citizen to another in a civil dispute. Such actions "do not come within the spirit or the intent of the basic purpose of the diversity jurisdiction of the Federal Judicial System." Senate Report 1308, *supra.*, at 2784. In his analysis of the issue, Wasson has noted that the legislative history of the amendment demonstrates that protecting a liability insurer from prejudice is no longer a federal concern. Wasson, *supra.*, at 466. Such a conclusion is entirely consistent with federal policy generally, and comports entirely with the spirit of the McCarran-Ferguson Act in reserving insurance legislation to the states. Through the 1964 proviso, Congress effectively returns such cases to the states recognizing, as a policy matter, the crowded federal dockets with the resultant delay in the resolution of true federal disputes. Such an analysis validates the Fifth Circuit's conclusion in *Campbell* that "the distinction urged is valid, but too thin."

II. DETERMINATIVE FACTORS

It has been persuasively argued that federal statutes, and particularly jurisdictional statutes, should be subjected to a strict construction. By focusing upon the language of the statute referring to actions "against" an insurer and the absence of a reference to actions "by" an insurer, Northbrook adopts a particularly narrow focus. Such a narrow focus is not necessarily consistent with strict, or good, construction. Northbrook's construction is identical to the analysis adopted by the Sixth Circuit in *Aetna*. The Sixth Circuit was particularly concerned that the 1964 proviso did not specifically state that it applied to actions initiated "by" insurers. *See, Aetna* at 127-28. As noted above, jurisdictional statutes traditionally are, and should be, strictly construed. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978). The policy underlying this familiar canon, however, is that such a construction serves to limit federal jurisdiction by such interpretation rather than to enlarge it. *Healy v. Ratta*, 292 U.S. 263, 270 (1934). It has been noted that the purpose of such policy is consistent with the traditional deference to state sovereignty, *Healy v. Ratta, supra.*, and "in order to keep [federal courts] free for their distinctive federal business. *Indianapolis v. Chase National Bank*, 314 U.S. 63, 76 (1941). By adopting a narrow focus on this particular proviso, Northbrook departs from the strict construction which it advocates, adopting a position calling for an expansion of federal jurisdiction – not a limiting of federal jurisdiction – in an area which has been particularly noted to be reserved to the states.

Northbrook's arguments completely ignore the anomaly which the position it advocates would create.

Specifically, the basis of the Fifth Circuit's holding in *Campbell* is the basic unfairness of allowing one party a choice between a federal and state forum while denying that choice to the other party to the same dispute. Under Northbrook's analysis, the insurer would have the luxury of a choice of forums, a choice which would be specifically denied to the injured party. In addition to creating a race to the courthouse, such a result would materially depart from Congress' specific intent relative to the proviso. The basic unfairness of such a result coupled with the requisite need to enlarge rather than restrict federal jurisdiction to reach the result, indicates that such an approach is lacking in sound foundation.

CONCLUSION

In presenting its arguments, Petitioner expressly recognizes – and even advocates – the strict construction of jurisdictional statutes. By adopting a narrow focus upon parts of arguments, and by ignoring others, Northbrook arrives at a conclusion which would expand rather than restrict federal diversity jurisdiction, and which is inconsistent with expressly stated Congressional intent. Such a conclusion would materially aggravate the problem of clogged federal dockets by transferring a significantly large worker's compensation case load from state to federal courts, a case load which is particularly well suited to local state court determination. Such a conclusion would also create the patently unfair result of providing out of state insurers with a choice of forums, while denying such a choice to the local injured parties. Neither

result is consistent with the Congressional intent underlying the 1964 Amendment to Section 1332(c), and such a position is not supported by either logic or sound policy.

For the reasons stated herein, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. THIS IS NOT A "DIRECT ACTION" ON A "POLICY OR CONTRACT OF LIABILITY INSURANCE."

From the false premise that this is "a civil liability dispute between two residents of the same state," Brief for the Respondent at 3, the respondent reaches the false conclusion that the present action is "peculiarly local in character," *id.* at 4, and hence allegedly unsuitable for diversity jurisdiction. In truth, this is an interstate dispute between an Illinois insurer and a Texas claimant, in which the other in-state resident – the Texas employer –

plays no role. It is no more local in character than any other first-party insurance dispute between parties of diverse citizenship.

In many states, employers are directly liable to their employees for workers' compensation benefits, and workers' compensation insurance is third-party insurance. In those states, the respondent would be largely correct in asserting that "[t]he liability issue is one between a local employer and a local employee . . . ." Brief for the Respondent at 4. It would indeed be arguable that, "[r]egardless of the existence of insurance coverage, the dispute remains a local dispute," *id.* at 3. The need for diversity jurisdiction to protect an out-of-state workers' compensation insurer from actual or perceived local bias in favor of an in-state injured worker would be minimized, as in the case of other "direct actions," by the insurer's co-liability with an in-state employer.

In Texas and certain other states, however, the workers' compensation insurer stands alone. Its liability is primary rather than derivative; its insurance is first-party insurance. Neither it nor the injured party is allowed to involve the employer in the dispute between them. It needs diversity jurisdiction as much as anyone: if relegated to the injured party's home state court, it has no in-state liable party to use as a shield against possible local bias.

To the extent that this action is "local" in character, the same can be said of numerous other insurance disputes which arise out of local occurrences, but which involve an insurer and a claimant of diverse citizenship. Yet diversity jurisdiction over such disputes exists

despite their allegedly "local" character. *See* Brief for the Petitioner at 17 n.23 and 23 n.32. Where diversity jurisdiction over "local" insurance disputes has been restricted, it has been by means of explicit Congressional command rather than by arbitrary judicial characterization of the subject matter. *Compare* 28 U.S.C. § 1445(c) (eliminating removal jurisdiction over workers' compensation suits) *with Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961) (original diversity jurisdiction over such suits persists despite § 1445(c)).

The direct action proviso is of course an explicit Congressional restriction of diversity jurisdiction. The language of the proviso limits its application, however, to "direct actions" on policies of "liability insurance." That language, by virtue of its plain meaning and not through any unusually narrow construction, does not include workers' compensation cases in states where workers' compensation insurance is not liability insurance, and in which workers' compensation suits do not qualify for the term-of-art "direct action."

Nor is an unusually broad reading of the statutory language necessary to fulfill Congressional intent. The respondent has correctly characterized the direct action proviso as "the congressional response to the jurisdictional dilemma created by *new* state direct action statutes." Brief for the Respondent at 5 (emphasis supplied). Workers' compensation statutes, and workers' compensation litigation in the federal courts, were far from "new" in 1964. Although Congress unquestionably desired to avoid an effective *expansion* of diversity jurisdiction through the proliferation of direct action statutes, the legislative history does not even hint at an intent to

contract the decades-old availability of such jurisdiction in workers' compensation cases. Although the language which Congress actually used in the direct action proviso may have had that effect as to workers' compensation litigation in states where employers are primarily liable, that language should not be stretched to reach situations which its fair meaning does not encompass when to do so would not fulfill any articulated legislative purpose.

II. THIS ACTION IS NOT "AGAINST" THE INSURER.

Apart from questions relating to the applicability of the direct action proviso to workers' compensation litigation lies the fact that by its own terms it applies only to actions "against" insurers. This limitation, far from giving an insurer "the luxury of a choice of forums" which is "specifically denied to the injured party," Brief for the Respondent at 11, sifts the wheat of *bona fide* invocations of diversity jurisdiction to avoid local prejudice from the chaff of gratuitous invocations of such jurisdiction for purposes unrelated to its creation. The insurer does not (due to personal jurisdiction and venue considerations) have the option of bringing suit in its home state court; the injured party does. The insurer therefore has need of a neutral federal forum; the injured party does not. There is no "basic unfairness of allowing one party a choice between a federal and state forum while denying that choice to the other party to the same dispute," Brief for

the Respondent at 11; the statutory distinction is rooted in the materially different situations faced by the parties.

Under both federal and state procedural principles, this case is brought "by" Northbrook as plaintiff "against" Brewer as defendant. Under Fed. R. Civ. P. 3, it was commenced when Northbrook filed its complaint with the court, not when Brewer filed his claim before the Texas Industrial Accident Board. The Supreme Court of Texas has long held that workers' compensation suits are not administrative appeals, but are instead original proceedings in a court of competent jurisdiction. *Booth v. Texas Employers' Insurance Association*, 132 Tex. 237, 123 S.W.2d 322, 328 (1938). It has recently confirmed that the administrative workers' compensation claim process is not "litigation," which instead commences when the dispute enters the judicial arena. *Flores v. Fourth Court of Appeals*, ___ S.W.2d ___, 32 Tex. Sup. Ct. J. 497, 498 (1989). These semantic labels serve to confirm the substantive principle that the direct action proviso limits the availability of a federal forum only when the party who selects the *judicial* forum is the in-state injured party who has no need of federal protection.

There is indeed a potential "race to the courthouse," *cf.* Brief for the Respondent at 11, whenever workers' compensation cases can be filed in state or federal court. That race is not generated, however, by any particular interpretation of the direct action proviso, but rather by the basic asymmetry created by 28 U.S.C. § 1445(c), which rewards the plaintiff who wins the race to state court by making his case unremovable notwithstanding possible

local bias in his favor. Thus the "race to the courthouse" is not an artifact of the "against the insurer" language of the direct action proviso, but is instead an inherent feature of the federal jurisdictional scheme as applied to workers' compensation cases.[1]

CONCLUSION

The modern history of diversity jurisdiction has been a history of gradual, thoughtful restriction. Where change has come, it has come through specific statutory language. The courts have construed this language fairly – not narrowly or broadly but reasonably in accordance with its manifest intent. Sweeping Congressional goals have not been postulated, in undoubted recognition of the fact that Congress has struggled over the years to balance the competing considerations which inform its discretion in extending or restricting diversity jurisdiction. The direct action proviso addressed the limited goal of eliminating certain gratuitous exercises of diversity jurisdiction. It should not be extended to cover cases

[1] A race between *state* courthouses often occurs in Texas workers' compensation litigation, generated by statutory provisions which permit any dissatisfied party to bring suit and which often establish venue in two different counties. *See* Tex. Rev. Civ. Stat. art. 8307, § 5; *id.* art. 8307a.

encompassed neither within its language nor within its limited remedial purpose.

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BRIEF

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H.R. Rep. No. 1229, 88th Cong., 2d Sess., 1 (1964) 9, 10

Rule 3, Federal Rules of Civil Procedure 15

S. Rep. No. 1308, 88th Cong., 2d Sess. 1, *reprinted* in 1964 U.S. Code Cong. & Admin. News, 2778 . . . . . 9, 10

MISCELLANEOUS

3 Elliot, *Debates On the Federal Constitution* (1836) 11

Barker, "Insurance Litigation, Diversity Jurisdiction, and the 'Direct Action' Proviso," Spring, 1985 *FIC Quarterly*, 225 10

Note, "Federal Diversity Jursidiction in Direct Actions - A Dispute Over the Application of Section 1332(c) - *Aetna Casualty & Surety Insurance Co. v. Greene* and *Campbell v. Insurance Co. of North America*," 29 *Kansas Law Review*, 143 (1980) 10

No. 88-995

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

Northbrook National Insurance Company,

Petitioner,

v.

Larry W. Brewer,

Respondent.

On Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

BRIEF AMICUS CURIAE FOR THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER

The American Insurance Association, with the written consent of the parties, respectfully submits this brief as Amicus Curiae in support of the petitioner. The letters of consent have been filed separately herewith.

INTEREST OF AMICUS CURIAE

The American Insurance Association ("AIA") is a national, not-for-profit trade organization representing 204 companies writing property and casualty insurance in every state and jurisdiction in the United States. Together, these companies write more than 54.5 billion dollars in premiums and have assets of 118.6 billion dollars. They are affiliated with 65,000 independent insurance agents throughout the country. AIA's member companies account for slightly less than 37% of commercial liability insurance and 35% of workers' compensation insurance nationwide.

The purposes of the Association are to promote the economic, legislative, and public standing of its members in the insurance industry; to provide a forum for discussion of problems which are of common concern to its members; to keep members informed of regulatory and legal developments; and to serve the public interest through activities such as the promotion of safety and security of persons and property.

The membership of AIA will be adversely affected if access to federal courts is limited in the manner prescribed by the decision below and, for that reason, the Association has long supported the retention of diversity jurisdiction. AIA has previously filed briefs *amicus curiae* in cases affecting the property and casualty insurance industry, including *Pittston Coal Group v. Sebben*, ___ U.S. ___, 109 S.Ct. 414 (1988). Accordingly, the AIA and the property and casualty insurance industry have a direct and substantial interest in the outcome of this litigation.

STATEMENT OF THE CASE

Petitioner Northbrook National Insurance Company ("Northbrook") brought this federal action to overturn a final award of the Texas Industrial Accident Board to respondent Brewer for alleged, work-related injuries. The Texas statute governing workers' compensation cases excludes the employer as a proper party defendant and requires that all suits to overturn awards by the administrative board are exclusively between the workers' compensation insurer and the injured employee. Tex. Rev. Civ. Stat., art. 8306, § 3; art. 8307, § 5 (Vernon Supp. 1988); *City of Austin v. Powell*, 321 S.W.2d 924, 930 (Tex. Civ. App.-Austin 1959, *writ ref'd. n.r.e.*); *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 702 (5th Cir. 1963). The court conducts a trial *de novo* on the compensation issue and the "burden of proof shall be upon the party claiming compensation." Tex. Rev. Civ. Stat., art. 8307, § 5 (Vernon Supp. 1988). Petitioner is a corporation that is incorporated and maintains its principal place of business in Illinois. Pet. App. A-1. Respondent Brewer is a citizen of Texas. *Id.* Northbrook provided workers' compensation insurance for

Brewer's employer, Whitemore Line Clearance, Inc., which is a Texas corporation. *Id.*

Suit was filed by Northbrook in the U.S. District Court for the Eastern District of Texas on May 27, 1987. *Id.* The jurisdiction in the district court was based on diversity of citizenship under 28 U.S.C. § 1332. The district court determined, on the basis of binding Fifth Circuit precedent, that no diversity jurisdiction existed under the proviso added to Section 1332(c) in 1964 and accordingly dismissed the case for lack of subject matter jurisdiction. Pet. App. A-12. 28 U.S.C. § 1332 states in relevant part:

> For the purposes of this section and section 1441 of this Title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

28 U.S.C. § 1332(c), as amended by Act of August 14, 1964, Pub. L. 88-439, 78 Stat. 445.

An earlier decision by the Fifth Circuit Court of Appeals held that a suit filed under the Texas statute by a local citizen against the employer's out-of-state insurer was a "direct action" involving a "policy or contract of liability insurance" within the meaning of Section 1332(c). *Hernandez v. Travelers Insurance Co.*, 489 F.2d 721, 722 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974). In *Campbell v. Insurance Co. of North America*, 552 F.2d 504 (5th Cir. 1977) (per curiam), an *insurance company* filed suit against an injured employee to reverse a compensation award by the Texas board. The Fifth Circuit in that case held that the action *by* an insurance company was an action "against" an insurance company under Section 1332(c). It did so on the grounds that it was unfair to provide a federal forum for the insurer, but not the employee

claimant, since the same policy considerations applied regardless of which party initiated the federal action and because the "overall proceeding seen as a whole, is that of a process initiated by the injured workman against the insurer; and even on the *de novo* appeal, the burden of proof remains with the [workman]." *Id.* at 605. Subsequent decisions by the Fifth Circuit limited *Campbell* to its facts, permitting diversity actions by insurers in any context other than a challenge to an award by the Texas workers' compensation board. *See Evanston Insurance Co. v. Jimco, Inc.*, 844 F.2d 1185 (5th Cir. 1988); *Dairyland Insurance Co. v. Makover*, 654 F.2d 1120 (5th Cir. 1981).

Moreover, the Sixth Circuit expressly rejected the *Campbell* decision in a declaratory judgment action brought by an insurer seeking to resolve workers' compensation claims. *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979). In refusing to follow *Campbell*, the Sixth Circuit stated that:

> A court cannot apply § 1332(c) to actions brought *by* liability insurers when explicit statutory language directs that this section applies to "... direct action[s] *against* [such] insurer[s] ...."

Id. at 127 (emphasis in original). The court reasoned that to so "supplement a clear statutory provision . . . would exceed the court's power of statutory interpretation, and would encroach upon the congressional power to legislate." *Id.* at 127-128. The court noted further that the legislative history revealed that "Congress was concerned exclusively with so-called 'direct actions' by injured parties." *Id.* at 127. Finally, it concluded that, unlike claims by local residents against foreign insurers, suits by such insurers fall within the "spirit and the intent" of diversity jurisdiction by providing a federal forum to an out-of-state resident who "may, at least in theory, be subject to a local prejudice in favor of the injured resident." *Id.*

The district court below, citing *Aetna*, stated that *Campbell* and *Hernandez* "do not represent an appropriate application of Section 1332(c)," but nevertheless denied diversity jurisdiction because it was bound by precedent. Pet. App. A-12. The court of appeals affirmed. Although noting that it "may well be that we

should reconsider both *Campbell* and *Hernandez*" because "*Campbell* already stands on weak jurisprudential legs in this Circuit" and subsequent decisions had "limited *Campbell* to its facts," it followed that decision in light of the "settled rule in the Fifth Circuit that a panel's decision may only be overruled by the court sitting en banc." Pet. App. A-8, A-9. Rehearing *en banc* was subsequently denied.

SUMMARY OF ARGUMENT

The express language of Section 1332(c) plainly states that insurance companies should be deemed citizens of the insured's state in actions "*against* the insurer." In all other circumstances, an insurance corporation such as petitioner is a citizen only of the state(s) where it is incorporated and has its principal place of business. Accordingly, the unambiguous statutory language affords no basis for departing from the normal principles of diversity jurisdiction by applying Section 1332(c)'s proviso where, as here, the relevant federal action is brought by, not against, an insurer.

While the Court has departed from this plain meaning rule in those exceptional circumstances where common sense or other compelling evidence of legislative purpose demonstrates that the statutory language could not accurately reflect congressional intent, this is clearly not such an exceptional case. To the contrary, all relevant indicia of congressional purpose further demonstrate that the statutory language's unambiguous distinction between actions by and actions against insurers was the product of conscious legislative choice. The legislative history shows that the entire purpose of the Section 1332(c) proviso was to preclude federal suits where an injured party sought to evade his own state courts by not joining the tortfeasor of the same state and sued only the tortfeasor's out-of-state insurer. The proviso was plainly intended as a specific legislative cure to the abuse of diversity jurisdiction caused by tort plaintiffs using "direct action" statutes to convert into federal suits those cases which were previously within the exclusive domain of their own state courts. In contrast, Congress manifested absolutely no intent, and had no reason, to similarly disable foreign insurance carriers. Permitting diversity jurisdiction

suits by these companies serves the traditional purpose of allowing them to avoid potential local prejudice in the injured party's state court and, in all events, would not clog the federal courts in the same manner as suits brought by "direct action" plaintiffs. This is true regardless of whether the neutral federal forum was invoked by the insurer in a suit involving monies awarded by a state administrative hearing or some other state law right.

ARGUMENT

DIVERSITY JURISDICTION EXISTS BECAUSE THIS IS NOT AN ACTION AGAINST AN INSURER

1. This case presents a remarkably straightforward and simple issue of statutory construction. The proviso added to 28 U.S.C. § 1332(c) in 1964 creates an exception to the normal rules of diversity jurisdiction by eliminating diversity in circumstances where it would otherwise exist. Specifically, it provides that an insurance carrier, in addition to its place(s) of normal citizenship, "shall be deemed a citizen of the state of which the insured is a citizen." 28 U.S.C. § 1332(c), *as amended by* Act of August 14, 1964, Pub. L. 88-439, 78 Stat. 445. The insurance carrier attains this additional citizenship, however, only in one specifically identified type of case, i.e., "in any direct action *against* the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party defendant." *Id.* (emphasis added)

Notwithstanding this explicit and unambiguous statutory language, the court below held that the proviso applied not only to actions *against* insurers, but also to the instant action *by* this insurer, to overturn an award made by the Texas Industrial Accident Board under that state's workers' compensation statute. Pet. App. A-9. In doing so, the court plainly disregarded this Court's oft-repeated admonition that judicial interpretation must be premised on the assumption "that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) quoting *Richards v. United States*, 369 U.S. 1, 9 (1962).

It is a "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Products Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If this analysis reveals that "the terms of the statutes [are] unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances'." *United States v. James*, 478 U.S. 597, 605 (1986) quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981) [citations omitted]. *See also United States v. Clark*, 454 U.S. 555, 560 (1982) ("... if the statutory language is clear, it is ordinarily conclusive."); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("[t]he meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."). Other interpretive aids such as legislative history are examined "to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require [the Court] to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433, n. 12 (1987), quoting *GTE Sylvania, Inc.*, 447 U.S. at 108.

This is particularly true where, as here, the statutory language is a proviso that creates an exception to the general operation of the statute. Such provisos are to be strictly construed because "the legislative purpose set forth in the purview of an enactment is assumed to express the legislative policy, and only those subjects expressly exempted by the proviso should be freed from the operation of the statute." 2A Sutherland Stat. Const. § 47.08 (4th Ed. 1984). *See A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945); *McDonald v. United States*, 279 U.S. 12 (1929).[1]

Application of these principles in this case compels the conclusion that the Section 1332(c) proviso applies to direct actions

[1] Of course, "due regard for the rightful independence of state governments" requires that federal courts "scrupulously conform their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934). This maxim, however, does not provide a basis for providing less jurisdiction than the "statute has defined" and this Court has literally construed diversity jurisdiction laws even if it permits a greater number of diversity cases then would otherwise result. *See Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348 (1961), *reh'g denied*, 368 U.S. 870.

brought against, but not by, insurance companies. The meaning of the word "against" is too obvious to require citation, incapable of ambiguity, devoid of meaning other than that given it by common usage, and in no event can be strained to encompass the term, "by." Thus, the citizenship of an insurance company in an action instituted by it is that produced by the normal principles of diversity jurisdiction, not the state of the insured under Section 1332(c).

2. Nor is this one of those "rare and exceptional circumstances" where the plain and unambiguous meaning of a statute's language does not accurately express the congressional purpose. The language neither "yields results so manifestly unreasonable that they could not be fairly attributed to [legislative] design" nor reflects any purpose that is "clearly contrary to [the] congressional design" revealed by other legislative materials. *United States v. Rutherford*, 442 U.S. 544, 555 (1979). To the contrary, all indicia of legislative purpose other than this statutory language reinforce the conclusion that Congress meant what it said in Section 1332(c). The other language in the statute, the legislative history, the circumstances surrounding enactment, the specific problem precipitating the amendment and the underlying purpose guiding Congress all demonstrate that destroying diversity for direct actions "against" insurers was precisely and only what Congress had in mind. Accordingly, it is clear beyond peradventure that the language of Section 1332(c) is not a congressional "mistake" requiring judicial revision.

First, the other language in the proviso reinforces the view that it was not intended to apply to suits initiated by an insurer. Most directly, the proviso applies only to actions in which "the insured is not joined as a party defendant." 28 U.S.C. § 1332(c). This language plainly suggests that an insurer's action is outside the proviso because it is most difficult to conceive of any action where an insurer would be expected to, but did not, join the insured as a party defendant.[2] Obviously, in a normal situation, the in-

[2] The lower courts, including the Fifth Circuit, have universally held that suits by insurers against those they insure over the scope of an insurance policy's coverage, as opposed to actions involving the insured's liability to an injured party, are not covered by the Section 1332(c) proviso. *Dairyland Ins. Co. v. Makover*, 654 F.2d 1120 (5th Cir. 1981); *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185 (5th Cir. 1988). *Cf. Aetna Casualty & Surety Ins. Co. v. Greene*, 606 F.2d 123 (6th Cir. 1979); *White v. U.S. Fidelity & Guar. Co.*, 356 F.2d 746 (1st Cir. 1966); *Fortson v. St. Paul Fire & Marine Insurance Co.*, 751 F.2d 1157 (11th Cir. 1985), *reh'g denied*, 757 F.2d 287.

surance company would defend the insured against a claim brought by an injured party. Thus, the natural construction of this language is that Congress was concerned about a situation where an injured party brought an action directly against a foreign insurance company without joining the insured party of the same state, in order to create diversity that would otherwise be unavailable under the "complete diversity" rule. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). This conclusion need not be inferred from the structure and language of Section 1332(c), however, because the legislative history repeatedly and unequivocally states that this was precisely the problem Congress sought to cure by this amendment.

The 1964 amendment to Section 1332(c) was a direct response to "direct action" statutes passed in Louisiana and Wisconsin, which, contrary to the traditional rule,[3] permitted an injured person to sue directly insurance companies without joining the alleged tortfeasor. This Court held in 1954 that diversity jurisdiction existed in a suit brought under the direct action statute by a Louisiana citizen against a foreign insurance company for a tort allegedly committed by an insured co-citizen, on the grounds that the insurance company was the real party in interest under Louisiana law and the insured was not an indispensable party that had to be joined. *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954). As a result, "... [court] cases involving only local residents, which in the other States would come within the exclusive jurisdiction of the State courts, would permit the filing of the lawsuits in the U.S. district courts in their respective states." S. Rep. No. 1308, 88th Cong., 2d Sess. 1, *reprinted* in 1964 U.S. Code Cong. & Admin. News, 2778, 2779 ("Sen. Rep."); H.R. Rep. No. 1229, 88th Cong., 2d Sess., 1, 2. Since the injured party and tortfeasor in most cases are citizens of the same state, permitting

[3] Prior to the advent of "direct action" statutes, the alleged tortfeasor was generally a necessary party in any action involving his liability to the injured party and/or the insurer was not a proper party defendant. *See* 8 Appleman and Appleman, *Insurance Law and Practice*, §§ 4851-53; 4861-62; 4862-66.25(1981).

such suits that name the insurance company as the only defendant provided a vehicle for a substantial number of tort plaintiffs to achieve complete diversity and thus gain access to a previously unavailable federal forum. The predictable result in Louisiana, albeit not Wisconsin, was that direct action cases substantially contributed to the onerous and rapidly expanding civil caseload of federal courts in that state. Sen. Rep. at 2779-2783, H.R. Rep. No. 1229 at 1-7. The Committee Reports believed that the Louisiana experience "clearly indicates what might be expected to occur in the Federal Courts throughout the country if each of the States were to enact legislation similar to the Louisiana statute." Sen. Rep. at 2784. Consequently, Congress concluded that the congestion of federal courts caused by a local resident bypassing the local tortfeasor to reach a foreign insurance carrier did not "come within the spirit or the intent of the basic purpose of the diversity jurisdiction of the Federal judicial system." *Id.*, H.R. Rep. No. 1229 at 7. Accordingly, "[t]he purpose of the proposed legislation [was] to amend Section 1332(c) . . . so as to eliminate under the diversity jurisdiction of the U.S. district courts, suits on certain tort claims in which both parties are local residents, but which, under a State 'direct action' statute may be brought directly against the foreign insurance carrier without joining the local tort-feasor as defendant." Sen. Rep. at 2778-79, H.R. Rep. No. 1229 at 1-2.[4]

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[4] *See* Sen. Rep. at 2785, H.R. Rep. No. 1229 at 8 (Letter of Nicholas deB. Katzenbach dated May 20, 1963):

> The purpose of the legislation is to overcome the direct action statute of Louisiana which has the effect of permitting a citizen of Louisiana who is injured by another citizen of that state to bring an action in the Federal court directly against the tort-feasor's insurance company without joining the tort-feasor when such insurance company is neither incorporated in Louisiana nor has its principal place of business in the State. Plaintiffs in such cases take advantage of the federal diversity jurisdiction . . . .

See also Note, Barker, "Insurance Litigation, Diversity Jurisdiction, and the 'Direct Action' Proviso," Spring, 1985 *FIC Quarterly*, 225; Note, "Federal Diversity Jurisdiction in Direct Actions - A Dispute Over the Application of Section 1332(c) - *Aetna Casualty & Surety Insurance Co. v. Greene* and *Campbell v. Insurance Co. of North America*," 29 *Kan. L. Rev.* 143 (1980).

It is therefore quite clear that the language of Section 1332(c) was intended as a specific legislative remedy for a specifically identified abuse of the diversity jurisdiction statute: direct action suits *against* foreign insurance carriers. It therefore cannot be suggested that the statutory language is somehow inconsistent with, much less contrary to, any congressional purpose reflected in the legislative history. That being so, the judiciary has no warrant to rewrite the statute to destroy diversity in circumstances where its language and legislative history make clear it should exist. Section 1332(c) simply affords no basis for treating suits by foreign insurance carriers differently than all others for diversity purposes.

3. The Fifth Circuit Court of Appeals, in the two-page opinion the court below was constrained to follow, nevertheless so revised the statute. *Campbell v. Insurance Co. of North America*, 552 F.2d 604 (5th Cir. 1977). It did so on the grounds that a literal interpretation of Section 1332(c) would provide federal jurisdiction for dissatisfied insurers "but none for the unhappy claimant," even though "all the same policy considerations" for excluding the claimant apply to the insurance carriers, which appears to be an unwarranted judicial assumption. *Id.* at 605. Assuming solely for the purposes of argument that diversity jurisdiction may be denied to one class of litigants simply because similar policy considerations led Congress to deny such jurisdiction to another class of litigants, the fact is that suits by foreign insurance carriers present diversity issues that are different in degree and kind from those actually addressed by Congress. In stark contrast to the "direct actions" prohibited by Congress, permitting diversity suits by out-of-state insurance carriers in these circumstances fulfills the traditional purpose underlying all diversity jurisdiction: providing a neutral federal forum to avoid the possibility of local prejudice. *See Barrow S.S. Co. v. Cane*, 170 U.S. 100 (1898); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); 3 Elliot, *Debates On The Federal Constitution*, p. 486 (1836) (remarks of James Madison) ("[a] citizen of another state might not chance to get justice in the state court, and in all events he might think himself injured.").

The direct action statutes did not come within the "spirit or intent" of diversity jurisdiction because they allowed local resi-

dents to invoke a federal forum in order to press a claim against a foreign insurance company even though the injury complained of was caused by a resident of the same state. Congress obviously had no inclination or ability to limit the availability of such direct action claims in state court. 110 Cong. Rec. 9316 (daily ed. April 28, 1964) (remarks of Rep. Mathias); (remarks of Rep. Boggs). It saw no reason, however, for allowing local residents to burden federal courts with state law claims in which a fellow citizen was *a*, if not *the*, real party in interest. The "direct action" plaintiff obviously had a readily available forum and defendant in his own state, where he could receive a perfectly even-handed hearing.[5] In light of this, a plaintiff who bypassed the tortfeasor and named only the diverse insurance company as a defendant was plainly attempting to manufacture diversity solely to avoid the state law applicable to all his fellow citizens.[6] *Cf.* 13B Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3602(1984)("[i]f the local-prejudice rationale for diversity jurisdiction is accepted, it is difficult to understand why a plaintiff who is a citizen of the forum state should be able to resort to a federal court in that jurisdiction.").

An out-of-state insurance company, however, obviously stands in entirely different shoes for diversity purposes. As the Sixth Circuit Court of Appeals aptly put it in declining to follow the *Campbell* decision:

> If, pursuant to § 1332(c), a liability insurer is denied access to the federal courts, the insurer is thereby forced to commence its action in a foreign jurisdiction, namely the local jurisdiction of the injured party. In this forum, the out-of-state insurer may, at least in theory, be subject to a local prejudice in favor of the injured resident.

[5] Of course, if the plaintiff can obtain personal jurisdiction consistent with the Due Process Clause, he may directly sue the insurance company in state court under these statutes. *Cf. Rush v. Savchuk*, 444 U.S. 320 (1980).

[6] In this regard, the rationale of Section 1332(c) is analogous to the first diversity statute, the Judiciary Act of 1789, which created diversity only where "the suit is between *a citizen of the State where the suit is brought*, and a citizen of another State." Judiciary Act of 1789, § 11, 1 Stat. 73, 78 (emphasis added). Thus, as here, diversity was allowed only in those cases where local prejudice was possible, but not permitted where that danger was not presented, i.e., where neither party was a citizen of the forum state.

> Because of this possibility of prejudice, direct actions brought by liability insurers, unlike direct actions brought by injured parties, lie squarely within "the spirit and intent . . . of the diversity jurisdiction of the Federal judicial system."

Aetna Casualty & Surety Insurance Co. v. Greene, 606 F.2d 123, 127 (6th Cir. 1979).

Thus, unlike direct action plaintiffs who manufacture diversity to avoid courts of their own state, there is no reason indicating that the standard rules of diversity jurisdiction should not be applied to a foreign insurance company. Indeed, in the very case in which this Court found that direct action suits satisfied diversity jurisdiction, Justice Frankfurter's concurring opinion made precisely this distinction in complaining about the plaintiff's "glaring perversion of diversity jurisdiction":

> *Here we have not an out-of-state litigant resorting to a federal court to be sure of obtaining for himself the same treatment which state courts mete out to their own citizens. Here we have a Louisiana citizen resorting to the federal court in Louisiana in order to avoid consequences of the Louisiana law by which every Louisiana citizen is bound when suing another Louisiana citizen.* If Florence R. Elbert, the present plaintiff, had to sue the owner of the offending automobile which caused her injury, or if she were suing an insurance company chartered by Louisiana, she would have no choice but to go, like every other Louisiana plaintiff who sues a fellow citizen of Louisiana, to a Louisiana state court and receive the laws administered by the Louisiana courts. But by the fortuitous circumstance that this Louisiana litigant could sue directly an out-of-state insurance company, she can avoid her amenability to Louisiana law.

Elbert, 348 U.S. at 56-57 (Frankfurter, J. concurring) (emphasis added).

Thus, in Section 1332(c), Congress drew the same distinction noted by Justice Frankfurter when it implemented the diversity

jurisdiction reform he had urged in his concurring opinion. Indeed, Congressmen Celler, the primary sponsor of the bill in the House, quoted this passage from Justice Frankfurter's opinion during the floor debates. 110 Cong. Rec. 9315 (daily ed. April 28, 1964) (remarks of Rep. Celler).

Contrary to what the court of appeals apparently believed, this differential treatment is not invidious discrimination requiring judicial correction; it is a reasonable distinction that reflects the differing potential of dissimilarly situated litigants to be exposed to the harm diversity jurisdiction was intended to prevent. To be sure, with respect to the Texas workers' compensation law, an injured party who does not receive the award he desires before the state administrative board does not have the choice between state and federal fora that is made available to an insurance company that loses before the board. The relevant point, however, is that the injured local resident, unlike the out-of-state insurer, cannot, under the traditional rationale of diversity jurisdiction, claim any need for a federal forum because local courts will evince no prejudice towards their own citizens.

In any event, Congress had an important practical reason for distinguishing between direct action plaintiffs and insurance companies. The number of diversity jurisdiction cases brought by the former class of litigants has much greater potential for creating the severe congestion of federal courts that motivated the 1964 amendment. While the number of plaintiffs that could bring tort or similar claims against diverse insurance companies is potentially staggering, as the Louisiana experience so eloquently attests, the potential number of circumstances in which an insurance company could bring a direct action (however defined) against an injured party will be comparatively rare.

Thus, the distinction between insurance carriers and those who would sue them is not only plainly drawn in the language and legislative history of Section 1332(c), it has the additional virtues of being entirely reasonable and consistent with both the underlying purpose of this proviso and the traditional rationale for diversity jurisdiction.

In the face of all of this, the court of appeals nonetheless insisted that the instant action was truly one against an insurance carrier because of the alignment of the parties in the antecedent state proceeding. Specifically, the court stated that the "overall proceeding seen as a whole, is that of a process initiated by the injured workman against the insurer; and even on the *de novo* appeal, the burden of proof remains with the [workman]." *Campbell*, 552 F.2d at 605. While it is quite obviously true that the dispute in federal court concerns money to which the petitioner does not believe the respondent is entitled, this hardly converts its lawsuit against the respondent into a lawsuit against itself.

Diversity jurisdiction is a federal question to be decided under federal standards at the time the federal forum is invoked. *See, e.g., Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961); *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 104 (1941) ("... decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions."); *Smith v. Sperling*, 354 U.S. 91 (1957); Rule 3, Federal Rules of Civil Procedure ("[a] civil action is commenced by filing a complaint with the court."). The federal action here is *against* the respondent for the amount of the award given him by the Texas workers' compensation board and the respondent would be legally entitled to that sum if this suit had not been initiated. The fact that respondent's claim of entitlement stems from a state proceeding which he initiated, rather than from some other source, simply has no bearing on the character of the claim pursued in federal court as one against the respondent by the petitioner insurance carrier.[7] Petitioner is in no different position than any

[7] Notably, none of the subsequent Fifth Circuit cases that have limited *Horton* to its facts has explained why the alignment of the parties in the Texas workers' compensation administrative proceeding should affect the availability of diversity jurisdiction or otherwise meaningfully distinguish the cases where that Circuit has allowed diversity actions by insurers. *Dairyland Ins. Co.*, 654 F.2d at 1124; *Evanston Ins. Co.*, 844 F.2d at 1189. Since "statute[s] should be interpreted to avoid untenable distinctions and unreasonable results whenever possible," the arbitrary distinctions drawn by *Campbell* and its progeny provide another reason for rejecting the Procrustean limitation engrafted on Section 1332(c) by that opinion. *American Tobacco Co.*, 456 U.S. at 71. Carving out a special rule for the Texas workers' compensation statute is also inappropriate because the diversity

other "out-of-state litigant resorting to a federal court to be sure of obtaining for [itself] the same treatment which state courts mete out to their citizens." *Elbert*, 348 U.S. at 56-57 (Frankfurter, J. concurring).[8] This is particularly true since, as this Court has already noted in ruling that insurance carriers may maintain a diversity suit to overturn a workers' compensation award under the Texas statute:

> The suit to set aside an award of the board is in fact a suit, not an appeal. It is filed as any other suit is filed and when filed the subject matter is withdrawn from the board.

Horton v. Liberty Mutual Insurance Co., 367 U.S. 348, 354 (quoting *Boothe v. Texas Employers Insurance Ass'n.*, 132 Tex. 237, 246, 123 S.W.2d 322, 328 (1938)), *reh'g denied*, 368 U.S. 870 (1961).[9]

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jurisdiction statute, "which is nationwide in its operation, was intended to be uniform in its application, unaffected by local rule, definition or characterization of the subject matter to which it is to be applied." *Shamrock Oil Corp.*, 313 U.S. at 104.

[8] For the same reason, the fact that the burden of proof is on the injured worker after the parties are in federal court is of no moment. This is simply a rule of evidence which does not affect jurisdictional concerns or the manner in which federal jurisdiction is invoked. Many defendants bear the burden of proof in actions which are nevertheless "against" them. *See Keyes v. School District No. 1, Denver, Co.*, 413 U.S. 189, 209 (1972), *reh'g denied*, 414 U.S. 883 (1973); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85, 97 (1977).

[9] It is true, but entirely irrelevant, that courts in declaratory judgment actions will examine the declaratory plaintiff's cause of action to determine whether a federal question is presented as part of the plaintiff's own claim, or simply in anticipation of a federal law defense. *Skelly Oil Company v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). *But see Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227 (1937), *reh'g denied*, 300 U.S. 687; *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Horton*, 367 U.S. at 352-54. Petitioner's suit is not a preemptive strike against a state law claim that the respondent might raise against it in the future; it is pursuing, by virtue of diversity jurisdiction, its own state law claim to overturn the award. It is equally true, and equally irrelevant, that in order to defeat attempts at evading the complete diversity rule, courts must "look beyond the pleadings, and arrange the parties according to their sides in the dispute." *City of Dawson v. Columbia Ave. Savings Fund, Safe Deposit, Title & Trust Co.*, 197 U.S. 178, 180 (1905). Here the two parties are plainly adversarial and petitioner is properly aligned as the plaintiff.

4. Indeed, the *Horton* case, standing alone, all but decides the issue presented here because it permitted precisely the action brought by petitioner, notwithstanding policy concerns of the sort invoked by the court of appeals, on the basis of the statutory construction principles set forth above. The district court in *Horton*, like the court below, concluded that it would "frustrate the congressional purpose to permit insurers to file workmen's compensation suits in federal court" because Congress had placed a particular limitation on diversity jurisdiction and precisely the same policy considerations underlying that limitation also plainly supported the limitation created by the district court. *Horton*, 367 U.S. at 352. Specifically, in its 1958 amendments to Section 1332, Congress "for the first time forbade the *removal* of state workmen's compensation cases from state court" to alleviate "the problem of congestion in federal courts [and the] trial burdens that claimants might suffer by having to go to trial in federal rather than state courts due to the fact that the state courts are likely to be closer to an injured worker's home and they also provide him with special procedural advantages in workmen's compensation cases." *Id.* at 351-52 (emphasis in original). Notwithstanding these directly applicable "appealing considerations," this Court[10] held that insurance carriers could file workers' compensation suits in federal courts, stating:

> But after the most deliberate study of the whole problem by lawyers and judges and after its consideration by lawyers on the Senate Judiciary Committee and in light of statistics on both removals and original filings, Congress used language specifically barring removal of such cases from state to federal courts and at the same time left unchanged the old language which just as specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount. In this situation we must take the intent of Congress with regard to the filing

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[10] Although four members of the Court dissented from the majority's decision that the insurer in that case satisfied the jurisdictional amount requirement, there was no dissent from its conclusion that this sort of action by insurers could be maintained.

> of diversity cases in Federal District Courts to be that which its language clearly sets forth. Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as removal of such suits, and it could easily do so still.

Id. at 362.[11]

Here, after having received an express invitation from the *Horton* Court to consider precluding such filings by insurance carriers to reduce the burden on courts and injured claimants that led to the ban on removing workers' compensation cases, Congress "used language specifically barring [direct actions *against* insurers] and at the same time left unchanged the old language which just as specifically permits civil suits [by insurers] to be filed in federal courts." Moreover, unlike *Horton*, the policies underlying the 1964 amendment do not justify the result reached by the lower court and the legislative history does not reflect any congressional purpose that would be "frustrated" if the statute were not expanded to reach an analogous situation. Yet the court below nonetheless took it upon itself to amend Section 1332(c) to preclude suits Congress had refrained from prohibiting in 1958 and which, after further notice, were again left wholly untouched and unmentioned in the 1964 amendment. *Horton* thus eliminates any possible doubt about whether the decision below constitutes an unwarranted judicial usurpation of the legislative role.

Accordingly, the instant action by the insurance carrier does not fall within the Section 1332(c) proviso.[12]

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[11] The Court so held although, unlike the instant case, the insurer gained the federal forum through a "race to the courthouse" between it and the claimant, who also challenged the Texas board's compensation award. Moreover, the Court so held even though the insurer was the *defendant* in the "overall proceeding seen as a whole" and thus, under the Fifth Circuit's logic, should have been subject to the ban against *removing* workers' compensation cases applicable to all similarly situated defendants sued in state court proceedings. 28 U.S.C. § 1441(a). *Cf. Shamrock Oil Corp.*, 313 U.S. at 104. The *Horton* court, however, looked at the claim being pressed in federal court, rather than the party's respective positions in the antecedent state proceeding, for purposes of determining diversity jurisdiction and the applicability of the removal provision.

[12] For this reason, the Court need not resolve whether this is a "direct action" by a "liability" insurer and we therefore do not address those questions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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